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A

TREATISE

ON

MARITIME CONTRACTS

OF

LETTING TO HIRE,

BY

ROBERT JOSEPH POTHIER:

TRANSLATED FROM THE FRENCH

WITH NOTES AND A LIFE OF THE AUTHOR,

BY CALEB CUSHING.

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TO THE

Hon. JOSEPH STORY, LL. D.

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

whose decisions, writings and example have been so highly instrumental in fixing the principles, illustrating the doctrines and promoting the study of maritime law, this work is inscribed, with sentiments of the greatest respect and gratitude,

by his obedient servant,

C. CUSHING.

ADVERTISEMENT.

THE treatises of Pothier on the different species of contracts are universally spoken of in the strongest and most unqualified terms of commendation. Pothier *has written admirable dissertations,* says Park, *upon every species of express and implied contracts. He has considered his various subjects with so much clearness and perspicuity, and has produced so many apposite examples in support of the positions he advances, that they greatly contribute to the advancement of the knowledge of this branch of jurisprudence. His style is at the same time manly, neat and classical; and well adapted to didactic discourses.*—Abbott is equally explicit. *The treatises of Pothier,* says he, *are remarkable for the accuracy of the principles contained in them, the perspicuity of their arrangement and the elegance of their style.*—*Pothier,* says Marshall, *unites the most profound learning with the purest morals and the most comprehensive judgment.*—The North American Review, in an article on maritime law ascribed to one of the most distinguished lawyers in America, considers the treatises of Pothier *equally remarkable for their brevity, luminous method and apposite illustrations.*—Chancellor Kent, in the great case of Griswold *vs.* Waddington, remarks that Pothier *has treated of the law of partnership, as he has of the other civil contracts, with a clearness of perception, a precision of style and a fulness of illustration, above all praise and beyond all example.*—Other quotations of the same import might be made; but it will be sufficient to adduce the following passage from the Essay on the Law of Bailments. *I seize with pleasure,* says Sir William

Jones, *an opportunity of recommending those treatises to the English lawyer, exhorting him to read them again and again: for if his great master Littleton has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works, in which all those advantages are combined, and the greatest portion of which is law at Westminster as well as at Orleans. For my own part, I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the public, than barely the introduction of Pothier to my countrymen, I should think that I had in some measure discharged the debt, which every man, according to lord Coke, owes to his profession.*—These authorities, it is presumed, will satisfy every person of the sterling value of the works of Pothier.

Considering the high praise, which has been constantly bestowed upon this jurist, it seems a little singular that he has not yet been naturalized among us; and that all his writings, except the Treatise on Obligations, continue buried in the obscurity of a foreign language. The translation, which is now offered to the profession, was undertaken with a hope that it might not prove wholly unacceptable, as a compend of the most useful parts of the maritime law of France. It is intended, if the design should meet with public approbation, to publish several other translations from the same author, corresponding in size and appearance with the present work.

This treatise, in the original, professes to be a supplement to the author's *Traité du Contrat de Louage;* but it is complete and systematic in itself, requiring no extraneous reference to make it perfectly intelligible; and it may therefore with propriety by considered as a distinct publication.

No merit is claimed by the translator, but the very humble one of having performed an irksome task with fidelity. The

few alterations, which he has ventured to make, are of a trivial nature, such as removing authorities from the text to the margin, and in one or two instances slightly modifying the original subdivisions of the treatise. The notes, which, excepting the last, are chiefly extracts from the continental jurists in confirmation or illustration of the text, it was thought proper to subjoin at the end, so that the body of the work might simply contain the words of Pothier unmixed with foreign matter of inferior importance.

LIFE OF POTHIER.

THE life of a man, who is exclusively devoted to professional pursuits, is seldom diversified by striking events; but it is not therefore destitute of interest, especially for those, who expect to tread the same path of unassuming usefulness. His life may contain no sudden reverses of fortune to excite curiosity; but it cannot fail to afford examples of ardor in the cultivation of science, of industry directed to the most beneficial purposes, and of high minded integrity in the discharge of delicate and arduous duties. Such a life was that of the upright judge, assiduous instructer and eminent jurist, who forms the subject of the following biographical sketch.

Robert Joseph Pothier was born at Orleans, January 9, 1699, of an honorable family, which had already given that city several respectable magistrates(*a*). Although deprived of his father at an early age, his love of knowledge and quickness of apprehension enabled him to study with advantage in the Jesuits' college, where he gained the rudiments of a classical education. His inclination was not long in declaring itself; for although at first he applied himself to the study of geometry, philosophy and polite literature, yet he soon abandoned them, and, embracing the study of jurisprudence, pursued it for several years with unremitted diligence in the university of Orleans.

(*a*) His father Robert, and his grandfather Florent Pothier, were both counsellors in the presidial court, and descended from Florent Pothier, a mayor of the city of Orleans.

In 1720, he was received a counsellor in the presidial(*b*) of Orleans and thenceforth his character was unalterably determined. By the zeal, with which he gave himself up to the duties of his station, he soon became distinguished, at an age when others of his profession hardly begin to be known. The facility of obtaining judicial offices before the revolution, sometimes by purchase, often by favor, and rarely as the reward of merit, subjected them to many abuses, among which it was not the least that men frequently entered upon the administration of justice without any preparatory practice at the bar and of course without any fitness for judicial employments. But Pothier had such a decided partiality for the study of law, and such a conscientious desire to fulfil the duties of a judge with fidelity, that he neglected no opportunity for perfecting himself in the science or practice of jurisprudence. By the most unwearied application in his closet, by constant attendance at the palace(*c*), by conferences with young men of the same taste and by consultations with an advocate of great erudition, he gained a fund of knowledge so extensive, that he was allowed the uncommon privilege of delivering his opinion during his minority(*d*).

(*b*) A presidial court is an inferior tribunal established in some *bailliages*, having jurisdiction of certain civil and criminal cases. The limit of its final jurisdiction in civil affairs was 250 livres in the time of Pothier, which was raised to 2000 livres at about the date of his death. The number of judges was frequently changed, but not less than seven composed a quorum. The judges in these courts, as in other baronial and municipal courts, bore the name of counsellors, from their having been originally the counsellors of the ancient lords, by whose authority justice was administered. *Encyclopédie Méthod., Jurisprud., sub vocc. conseiller, présidial.*

(*c*) That is, when under the age of twenty five years.

(*d*) The place in which the courts are holden at Paris, and other large cities, is called the palace, because it had originally been the residence of the king or other feudal superior. *Encyclopédie Méthod. Jurisprud. sub voce palais.*

His method of investigating a subject was to write a dissertation upon it, as he was persuaded that this was the best, if not only, method of completely mastering intricate questions. The definiteness of conception, the systematic arrangement of ideas, the faculty of contemplating a thing in all its aspects and bearings, which the labor of writing facilitates or produces, are advantages unattainable by the most careful reading, without the assistance of composition.

When Pothier became of sufficient age to perform all the functions of a judge, his learning, assiduity and promptitude gave him a marked ascendancy over his colleagues. Through his exertions the subordinate court, of which he was a member, gradually rose in the public esteem, men of talents were persuaded to embrace the magistracy, and an emulation was excited among the counsellors and at the bar, which gave his tribunal a great accession of usefulness and celebrity. But his views were not limited to the mere extension of a provincial court, however useful that court might be capable of being rendered. He had formed more comprehensive plans for the promotion of legal science. By profound and elaborate study of the civil law, he was thoroughly imbued with all its principles, and learned to regard it with veneration, as the most imperishable monument of the magnificence of Rome. But his admiration of this system did not make him insensible to its defects; and the difficulties, which he himself was obliged to surmount in acquiring an exact knowledge of the civil law, led him to perform a work, which widely extended his reputation, not only in France, but throughout the continent of Europe. This work was a new arrangement of the Pandects of Justinian.

The laws of Rome, which originally consisted of only twelve tables, increased in the lapse of ten centuries, by the gradual addition of decisions, edicts, decrees and interpretations, to such an immense bulk as to fill many thousand vol-

umes and render a reformation of these laws indispensable. When therefore Justinian resolved upon digesting the substance of the laws in a systematic form, the jurisconsults, to whose charge he committed the task, were obliged to peruse and abstract a vast multitude of separate treatises; to collate the texts and arrange them in a suitable order; to select what was important and omit what was obsolete and useless; to exhibit and yet reconcile the conflicting opinions of lawyers on controverted points; and to preserve the knowledge of the ancient as well as establish the doctrines of the modern jurisprudence. This immense labor was performed in the brief space of three years; and whatever praise we may bestow on the jurists, who made the compilation, for their zeal and industry, it is certain that so much precipitancy was not consistent with perfection of plan or correctness of execution, even if the work was superintended by the genius and erudition of Tribonian. Hence it is that three grand defects impair the value of the Pandects. In the first place, they do not exhibit the pure and genuine text of the writers, whom they quote, in consequence either of the carelessness and ignorance of transcribers or else of the numerous alterations interpolated by the command of the emperor. Secondly, contradictory principles are extracted from various books or adopted from jurisconsults of opposite sects, which all the skill and ingenuity of modern doctors cannot reconcile. Lastly, no certain method was adhered to in compiling the Pandects; for although it was intended to follow the general arrangement of the perpetual edict, yet the particular laws or citations were digested with little else for a guide but chance or the caprice of Tribonian(*e*).

Pothier undertook to remove these evils, and, so far as could now be done, impart to the Pandects that finish and regularity, which they would undoubtedly have possessed if compiled with greater care and in a more enlightened age of the world.

(*e*) *Pandectæ in novum ordinem digestæ, præf. p.* 68, *et seqq.*

He conceived the plan of the work in his youth, intending it originally for his own private use; but having communicated one of the titles in its improved form to M. Prévot de la Janés, one of his associates on the bench(*f*), he was persuaded by this discerning friend to complete the work for publication. This object was strenuously promoted by the glory of his country and of legal science, the chancellor d'Aguesseau, who, being apprized of the author's undertaking, constantly advised, assisted and supported him in its execution(*g*).

After Pothier had spent more than twenty years upon this great work, it finally issued from the press in 1748, under the title of *Pandectæ Justinianeæ in novum Ordinem digestæ*(*h*). The introductory matter is a valuable preface on the history of the civil law, the fragments of the twelve tables with a commentary, and fragments of the perpetual edict. In the body of the work the original order of the books and titles is preserved, but the laws are all arranged anew in exact system, following each other with easy transitions, connected by general inferences and distributed into a regular succession of definitions, divisions, rules and exceptions. At the head of each title is placed an introduction, explaining the subject of it and containing preliminary texts. Endeavors are made throughout to give an account of the changes, which the law had undergone,

(*f*) M. Prévot de la Janés, counsellor in the presidial and professor of French law in the university of Orleans, was a magistrate distinguished for his talents, wit and learning.

(*g*) The chancellor d'Aguesseau had several conferences with Pothier on the subject, wrote him several letters in praise of the design and even sent him papers containing remarks and hints for its improvement. The chancellor examined many parts of the work in manuscript. He likewise suggested the plan of the two concluding titles, *De Verborum Significatione*, and *De Regulis Juris*.

(*h*) In three large folio volumes. Pothier was considerably assisted by M. de Guienne, advocate in the parliament of Paris, who composed the preface, index, commentary on the twelve tables and many of the notes.

and for this purpose fragments of the old jurists are incorporated in the work. Passages are likewise inserted from the Code and Novels. Finally, the whole is enriched with annotations, in which the purity of the text is restored, its obscurities removed and its seeming contradictions reconciled. This edition of the Pandects did not escape the criticism of some of the foreign journals; but its merit was so decided and its value so conspicuous, that it instantly raised its author to the rank of one of the first civilians in Europe(*i*).

The merit of Pothier was now so well established, that, in 1749, he was appointed, without having solicited the favor, professor of French law in the university of Orleans. The last incumbent, M. Prévot de la Janés, by his agreeable manners and entertaining conversation, had succeeded in attaching his pupils to the study of jurisprudence; and he could not have had a successor more capable of completing what he had begun than Pothier. Pothier was very fond of the society of young men, and very solicitous to convey instruction; and on this account he had been in the practice, for many years, of holding a weekly conference with the young advocates and counsellors of the city, for the discussion of interesting questions of law.

Pothier entered upon the duties of his professorship with the greatest zeal. He was sensible of the difficulty there is in inspiring young men, who are just emerging into manhood and who have recently escaped from the burden of collegiate restraints, with a predilection for the repulsive details of jurisprudence. But his ardor for the promotion of the study was in-

(*i*) It is by this work that he became most known on the continent out of his own country. Haubold, speaking of him, says: *opere utilissimo, in quo Pandectas cum reliquo Jure Justinianeo contulit et passim docte illustravit, clarus.* (*Hauboldi Institutiones Juris Romani Litterariæ, t.* i, *p.* 150.) See likewise Meerman, who says: *vir eruditissimus et Pandectarum Justiniani restitutor felicissimus, Robertus Pothier. Thesaur. Jur. Civil. tom.* iv, *præf.*

vincible: and he believed that, if the first approaches to the science were once successfully won, the student could not fail to proceed with rapidity and delight in the more advanced stages of his legal education. However harsh the law might appear to persons, whose intellectual powers had been emasculated by habits of desultory reading in polite literature, he felt that a science, which is intimately associated with ethics, history and politics, and which comprehends within itself all that is most striking in the moral constitution of man, must be capable of powerfully interesting active and inquisitive minds.

The predecessors of Pothier had satisfied themselves with reading a course of erudite lectures, leaving their pupils to pursue their studies unaided and alone, and not endeavoring to accommodate their instructions to the capacity of individuals. Pothier embraced a method altogether dissimilar. He continually associated with his pupils, conferred with them on their occupations, proposed questions for their solution in the lecture-room, and did every thing in his power to awaken and gratify a thirst after knowledge. Instead of an examination, which had previously concluded the legal studies at the university, he substituted a public disputation, in which the most able disputants received a gold medal as a reward for their talents and proficiency(*k*). His private deportment as a professor was equally judicious with his public exertions. As students at law have usually reached an age, at which they are capable of appreciating the powers of their instructer, it is necessary for him to shun all affectation of superior knowledge, and yet exhibit proofs of such profound and extensive information as should gain their unqualified respect. In this delicate task Pothier fully succeeded; and by these means the university presented an uncommon number of eminent men to the bench and bar during his professorship.

(*k*) Two gold medals and several silver medals were annually awarded.

Notwithstanding the duties, in which Pothier was now so much engaged, his industry enabled him to prepare many works for the press, which greatly enhanced his usefulness and reputation. In 1740 he had given the public an edition of the customs of Orleans; and in 1760, this work being out of print, he published it again with large additions, converting it, indeed, into a most valuable and comprehensive summary of the customary law. At the head of each title he prefixed a brief treatise on the subject, in which the civil law was called in to elucidate the customary, the whole being consolidated with that neatness and precision, for which his subsequent productions were so highly distinguished.

His situation in the university about this time suggested to him the composition of a series of treatises on the laws of his native country, which he partly executed, and which constitute his strongest claim on the praise of posterity. In order to comprehend the merit of these performances, it will be necessary to examine the sources and nature of the municipal institutions of France.

France, in the time of Pothier, was distinguished, with respect to the laws of the country, into two grand sections; one of which, comprising the southern provinces, acknowledged the civil law as the law of the land, while the other was governed by certain peculiar customs and immemorial usages(*l*). The origin of this distinction, and still more of the customary law, is far from being certain; but the researches of modern writers throw considerable light on a subject, which the want of historical documents, the revolutions of the monarchy and the barbarism of the middle ages had involved in obscurity(*m*). The most plausible hypothesis seems to be, that, when the barba-

(*l*) The first was called *pays de droit écrit*; the second, *pays coutumier*.

(*m*) *Dénisart, Collection de Jurisprudence par Camus et Bayard, dis. prél.* 73, 74.

rians subdued Gaul, they found the country entirely Roman, speaking the language, imitating the manners and obeying the laws of the metropolis. The barbarians also brought with them their own language, manners and laws; but they did not force them upon the conquered people; every person had a right to be judged by those laws, to which he professed submission. Hence at this time laws were wholly personal, not territorial; Franks were governed by the laws of the Franks, Romans by the laws of the Romans; but as the Franks, who gained possession of the northern provinces, treated the Romans with contempt, in these provinces the civil law insensibly gave place to the usages of the conquerors. But the Goths and Burgundians, who settled in the southern provinces, were more lenient towards the inhabitants; who therefore retained the laws to which they were accustomed, finding their observance occasioned no civil disabilities, as it did in the patrimony of the Franks(*n*).

The civil law, which thus remained in force in the southern provinces, was preserved in the code of Theodosius and the writings of the more early jurisconsults: for at this time the western parts of Europe were not included in the empire of Justinian(*o*). As the night of the middle ages came on, the texts of the law were lost or forgotten; and the law itself survived as a traditionary usage or species of customary law(*p*); but when the compilation of Justinian was recovered and taught in the twelfth century, it was immediately received as law in the provinces, which had before adhered to the laws of Rome. Thus it was that the civil law maintained its authority in the southern parts of France amidst all the changes and vicissitudes of the government(*q*).

(*n*) *Montesquieu, Esprit des Loix, t.* xxviii.; *Encyclopédie de M. d'Alembert, sub vocc. Droit Fran.*

(*o*) *Fleury, Histoire du Droit, &c. p.* 10, 11, 60, *et seqq.*

(*p*) *Domat, Introduc. Treat. of Laws, v.* i, *p.* 51.

(*q*) *Encyclopédie Méthod. Jurispru. au mot Code.*

The sources of the customary law are discoverable in the ancient usages of the Gauls, in the Roman institutions, in the codes of the Franks and other barbarous tribes which conquered Gaul, and in the capitularies of the kings of France. All these are valuable only as objects of historical curiosity; for their authority and their very being fell into temporary oblivion during the disorders of the dark ages, when ignorance and anarchy pervaded Europe. At this period tradition took the place of written rules; and of course the laws became uncertain and fluctuating. Fiefs becoming perpetual and hereditary, the barons usurped all the power within their reach, claiming the rights of sovereigns over their vassals, making war on their neighbors and establishing rules for the government of their particular dominions. The consequence of this was, that every province acquired a dialect and laws different from every other province. The inhabitants of cities were obliged, also, to secure their internal safety by peculiar laws. The serfs of powerful barons were often liberated on certain conditions, which afterwards became the law by which those persons were governed. And the turbulence of the barons, as well as the unsettled state of the whole country, prevented any thing like concert in the enactment of laws, except within the narrow limits of a single village, city or seigniory(r).

By these means it happened, that, when learning and the liberal arts began to revive, the only laws known in France were the different usages of the several parts of the kingdom. The discovery of the civil law, as we have seen, gave the southern provinces a written code and record of the laws, which they were then obeying as customs; but the northern provinces long continued subject to the inconvenience of having no laws, excepting an imperfect and uncertain mass of contradictory usages. In the eleventh, twelfth and thirteenth centuries a

(r) *Fleury, Histoire du Droit Fran.; Montesquieu, Esprit des Loix, l.* xxviii.

few of these were committed to writing in the form of charters granted cities or affranchised serfs, books composed by practitioners and even custumaries compiled for one or two provinces. But as all these were defective and inadequate, Charles VII, having driven the English from France, published an ordinance in 1453, in execution of a design already formed by his predecessors(*s*), requiring all the customs to be reduced to writing and verified by the practitioners of each country, and then examined and authorized by the great council and parliament; and directing that the customs thus collected and approved, and those only, should be observed as laws(*t*). Learned writers declare that this collection was intended to be merely preparatory to the compilation of a grand and uniform custumary for the whole nation(*u*). But so many obstacles interfered with this design, that it was never accomplished, and two hundred years elapsed before a correct and full collection was made of the original customs prevailing in the kingdom.

The ceremonies attendant on the collection of these customs were long and complicated; it being necessary that the compilation should be ordered by the king, made on the spot by the judges and municipal magistrates, approved and authenticated in an assembly of the three states and finally enregistered by the parliament(*v*). The peculiar customs of each province or city, when thus collected and published, formed its custumary. Jurists enumerate sixty general customs, that is, such as were observed in whole provinces, and three hundred local customs,

(*s*) *Encyclopédie de M. d'Alembert, au mot Coutume, p.* 412.

(*t*) See the words of the Ordinance in *Dénisart, Collection de Jurisprudence, disc. prélim. p.* 66.

(*u*) *Fleury, Histoire du Droit, &c. p.* 90, 91. Philippe de Comines in his *Mémoires* says, that *Louis* XI *désiroit...que toutes les coutumes fussent mises en Francois dans un beau livre.*

(*v*) *Fleury, Histoire, &c. p.* 93, 94; *Dénisart, Collection de Jurisprudence, &c. t.* v, *p.* 666.

which were observed only in a particular city, borough or village: most of which have been the subject of commentaries(*w*).

Although it appears, from what has been said, that a territorial distinction arose between the countries governed by the civil and customary laws, it does not by any means follow that these laws had no resemblance in their details. Many countries, where the civil law was the law of the land, had their customs also(*x*); and all the countries were largely indebted to the civil law for some of their most essential regulations, which the defective usages of the feudal system could never afford. The prevalence of the civil law was increased by the ecclesiastics; for although one of the canons forbids any person to teach or learn the civil law in Paris and in the neighboring cities under pain of excommunication(*y*); yet it is evident that the canon law would greatly tend to diffuse the study and authority of the civil law, from their striking similarity(*z*). And this effect was farther promoted by the superstitious respect, which, on the revival of letters, was bestowed on every thing bearing the name of ancient Rome(*a*).

(*w*) *Camus, Lettre sur la Profession d'un Avocat; Dénisart, Collection de Jurisprudence, t.* v, *p.* 679, 680; *Encyclopédie ubi supra, p.* 413.

(*x*) *Encyclopédie ubi supra, p.* 414; *Dénisart ubi supra, p.* 674, 175.

(*y*) *Decretal. Gregor. l.* v, *t.* 33, *c.* 28, *super specula, extra de privilegiis, p.* 703.

(*z*) *Fleury, Histoire, &c. p.* 54—57.

(*a*) The influence of the clergy in preserving the civil law during the middle ages is thus alluded to by Mr. Wheaton, in his eloquent and comprehensive review of the history of international law. *The utility of the rules of justice recommended them even to barbarous minds; and it was a fortunate circumstance for the return of civilization in Europe, that the interests of the clergy, the most powerful and enlightened order of men in that age, induced them to cherish whatever of respect was continued to be professed for those rules during the prevalence of feudal barbarism.* See *Anniversary Discourse delivered before the New-York Historical Society, p.* 25.

In addition to the civil and customary law, which prevailed in the several provinces, there was another source of municipal laws, which were not confined within geographical lines, but were equally binding throughout the kingdom, namely, the royal edicts. Laws emanating from the king bore different names in successive periods of the monarchy, being at one time denominated capitularies, and at another establishments, and being finally distinguished into letters-patent, edicts, declarations and ordinances. The power of the king in this respect was originally very limited, being checked by the great barons, who might refuse obedience to his edicts, and by the parliaments, which often opposed the registry, publication and execution of them as laws; but in latter times, when the great fiefs were all annexed to the crown and the power of parliaments had declined, edicts were registered as a matter of course, and instantly acquired the force of laws of the most comprehensive nature(*b*). These edicts or ordinances were therefore laws enacted by the sole authority of the king in abrogation, amendment or confirmation of existing institutions(*c*).

They were various in their character and objects, and, although more generally calculated merely to extend the power of the crown or subserve the purposes of temporary policy, yet they were sometimes provident codes of the most general and

(*b*) Ineffectual remonstrances were often made against the registry of edicts; but the parliaments seldom persisted in opposing the will of the king. The famous anecdote of Louis XIV, who, when the parliament intended to assemble on the subject of one of his edicts, entered the court in a hunting dress with boots, having a whip in his hand, and positively forbade their assembling, is a remarkable instance of the weakness of parliaments. *Siécle de Louis* XIV, *c.* 25.

(*c*) *Encyclopédie de M. d'Alembert, sub voce Ordonnance; Fleury, Histoire, &c. p.* 95—100; *Dénisart, Collection de Jurisprudence, dis. prélim.* 67, 68; *Evans' Pothier, Introduc., p.* 54.

Many collections of the ordinances were made at different times, under various forms and names; and many commentaries have appeared upon the most important ordinances.

unequivocal utility. Such, among others, were the ordinances for the regulation of civil and criminal process, of the colonies, of inland commerce and of marine affairs, issued by Lewis XIV(*d*). His celebrated marine ordinance may be considered a fair example of those ordinances, whose chief aim was the national good; and a description of the manner, in which it was prepared, will apply to similar undertakings of that ambitious monarch. A compilation was first made of all the ancient maritime laws, in which they were collated and illustrated with notes and the opinions of learned authors; afterwards a special commission was appointed to visit all the ports in the kingdom, collect the laws, usages and maxims obeyed in the several courts of admiralty and remark the defects in the principles and forms according to which justice was there administered; and lastly a complete code of maritime law was extracted from these documents, which long remained unrivalled in modern times as a specimen of enlightened legislation(*e*).

Nor were these three principal species of laws, with all the commentaries written upon them, the only regulations, which prevailed in the country. The decrees and decision of parliaments, although not absolutely considered in the light of laws, were allowed to fix many doubtful points, which the common law left undecided. Until the publication of the marine ordinance there was no written maritime law in France; and even afterwards cases occurred, which that ordinance did not comprehend; so that merchants and jurists were obliged, as we now are, to have frequent recourse to the usages of the sea and the writings of experienced men on the subject of navigation. Finally, the canon law was of supreme authority in ecclesiastical affairs, and therefore constituted a very copious and comprehensive portion of the laws of the kingdom(*f*).

(*d*) *Voltaire, Siécle de Louis* XIV, *ch.* 29. (*e*) See *post* note 55, *p.* 158.

(*f*) The history of the law of France is found in the books cited in the preceding notes, to which may be added *Butler's Horæ Juridicæ*;

The most superficial observer will perceive how desirable it must have been, that some powerful mind should arise to give method, fixedness and uniformity to these complicated institutions. Such a task was reserved for Pothier. No man of his nation or age possessed more clearness and precision of thought, more perspicacity of judgment, more extensive and profound legal information; and therefore no man was better adapted to commence the reformation of the laws of France. And an examination of those admirable treatises, which occupied him the remainder of his life-time, will satisfactorily prove that he did in fact commence this reformation.

In 1761 first appeared the masterly work of Pothier on the nature, qualities and consequences of moral and legal obligations, entitled *Traité des Obligations selon les Régles tant du For de la Conscience que du For extérieur*, which immediately became one of the classical law-books of France. The treatise is divided into four parts. The first part discusses the essence and effects of obligations, in which are considered the nature, kinds and defects of contracts, the persons by whom and the things as to which contracts may be made, the effects of contracts and rules for their interpretation, the parties and objects of other sources of obligations beside express contracts, the effect of obligations in general on the debtor and creditor, and the damages arising from the non-performance of obligations. The second part relates to the different kinds of obligations, comprehending an account of eleven divisions of obligations, of the different modifications and conditions under which obligations may be contracted, of the nature of divisible and indivisible obligations, of penal obligations and finally of accessory obligations. The third part, concerning the ways in which obligations are extinguished and the different estoppels or prescriptions against the claims of creditors, describes the legal effect of pay-

Bernardi, Essai sur les Révolutions du Droit; Encyclopédie Méthodique, Jurisprud., aux mots Coutume, Droit Fran., Ordonnance.

ment or proffer of payment, the nature of novation, the release of a debt, compensation, discharge by confusion, extinction of an obligation when the thing due ceases to be susceptible of obligation, estoppels and prescriptions and other ways in which obligations are barred and extinguished. The last part regards the proof of obligations and of their discharge, including written evidence by original authentic titles, private papers and copies, parole evidence, confession, presumptions, authority of judgments and the oath of the parties concerning the matter in litigation(*g*).

The treatise, of which we have drawn this outline, evidently comprises the most elementary and important branches of municipal law, and served, according to the design of its author, as an introduction to a series of essays on all the species of express or implied contracts recognised by the laws of France. Every subsequent year of Pothier's life produced a new work; and he left behind him a large number of manuscripts nearly ready for the press, most of which have since been published. Treatises on the contract of sale, right of redemption, constitution of rent, exchange, letting to hire, partnership, beneficence, deposit, insurance, marriage, community and dower, among others, appeared during the life of Pothier; and soon after his death, treatises on fiefs and the remains of the feudal tenures, testaments, successions, hypothecation and other subjects of less importance(*h*). Their merit and exe-

(*g*) The *Traité des Obligations* has been translated by Evans; but the mass of illustrations accompanying his translation doubles the cost of the book, without proportionally increasing its actual value.

(*h*) The following list contains the titles of his treatises. The *Traité du Droit de Domaine* was the last published in his life-time.

Traité des Obligations.
du Contrat de Vente, &
des Rétraits.
du Contrat de Constitution de Rente, &
du Contrat de Change.
du Contrat de Louage.
du Contrat de Bail-à-rente.
des Contrats de Louage maritimes.

cution are so uniform, that, if their author had lived to complete his plan, they would have formed a perfect system of the law of contracts; and we may therefore consider them all under a single view, as possessed of the same general characteristics.

In each of them, the plan comprehended all the parts of the subject, the definitions were exact and logical, and the divisions grew out of the definitions in the most natural and systematic order. The discussions in them were not extended into minute and diffuse details, nor were they narrowed into dry, hard and unprofitable sketches; they were luminous, yet compressed, views of the most useful principles, illustrated by clear examples, and applied to the cases, which ordinarily arise in the practice and theory of jurisprudence. Pothier was not contented with a mere compilation of legal authorities: he re-

Traité du Contrat de Société.
des Cheptels.
des Contrats de Bienfaisance.
du Prêt-à Usage.
du Contrat de Prêt de Consomption.
du Contrat de Dépôt et de Mandat.
du Contrat de Nantissement.
des Contrats aléatoires.
du Contrat de Mariage
de la Communauté.
du Douaire.
du Droit d'Habitation.
des Donations entre Mari et Femme.
du Don mutuel.
du Droit du Domaine de Propriété.
du Droit de Possession.
Traité des Fiefs, Censives, Relevoisons et Champarts.
des Tutelles et de la Garde-noble.
des Servitudes.
des Donations entre-vifs.
de la Légitime.
des Testamens.
des Substitutions.
des Successions.
de l'Hypotheque.
de la Subrogation.
de la Vente des Immeubles par Décret.
de la Procédure civile et criminelle.
de la Representation.
des Réparations des Bénéficiers.

Various editions of these works have been printed, of which it will be sufficient to name that of Orleans and Paris, in 28 vols. duodecimo, that of 1781 in 8 vols. quarto, and that recently published at Paris in octavo, which contains a collation of the text with that of the new Code.

duced the customary, the civil and the positive law to one harmonious whole, enabling them mutually to throw light upon each other, and conduce to the same end of justice and reason. Thus it was that each of his treatises afforded a finished view of the laws of France with respect to the particular contract under consideration. These treatises were therefore not valuable in one province alone, nor solely adapted to the purposes of speculative jurists; but were equally serviceable to the citizen, the magistrate and the scholar in every part of the kingdom.

It is remarkable of these tracts, that they do not comprise a bare system of legal doctrines, but also teach the principles of moral justice; so that here we may find at once what rights we can judicially enforce, and what we can claim as our equitable due. Without a knowledge of existing laws, moral science is apt to become abstract, theoretical and visionary: as without being elevated by connexion with morals, jurisprudence degenerates into an arbitrary and capricious collection of positive enactments. Pothier never allowed himself to wander from his legal pursuits, excepting for the purpose of studying theology as united with moral philosophy; and these investigations he made subservient to the chief aim of his life, namely, the advancement and elucidation of the science of law. Hence the pure morals inculcated in his works are no less a merit, than his exactness and precision in stating the municipal laws of his country.

His style is perspicuous, accurate and simple, but without any of the elegancies of composition: for he conceived precision to be the most essential quality of legal writings. The clearness, with which he thought, imparted a corresponding clearness to his language, and gave him the greatest facility in expressing his opinions; but this very facility prevented his employing any labor in polishing his compositions. In short, the merit of his style is its perfect precision: an excellence, which is so rare in writers of ordinary talents, and which occurs so frequently in the works of accomplished lawyers.

There is nothing in it redundant, nothing deficient; every word possesses so much efficacy, that it could not be spared without material injury to the sentence where it stands; nor could any addition to the sentence increase its clearness or comprehensiveness. Such is the style, which every legal writer should endeavor to gain, as the most exact, forcible and appropriate for the science of jurisprudence.

Pothier lived long enough to hear his works cited as authoritative in courts of justice, to attain the character of an oracle in legal topics and to perceive the universal diffusion of his writings, principles and fame; but he died before he could fully understand the greatness of the benefit, which he had conferred on the laws and people of France. The methodical abridgment of the law of contracts, which his treatises contained, was so general in its application, so perfectly accurate, and so perspicuous and comprehensive in its details, that a reformation of the national jurisprudence was now grown, comparatively speaking, easy of accomplishment. And therefore, when the revolution had swept away all the ancient landmarks of property, right, religion, law and government, the publication of a new code of laws, instead of the multifarious laws before existing, was among the first and dearest projects conceived by republican France. Of the learned authors, whose writings were consulted in the compilation of this code, none was more closely followed than Pothier(*i*). He was, in fact, the general authority, the textuary jurist, with reference to whom the new code was constructed; and to him, therefore, is due much of the merit of a system, which, abolishing the troublesome distinction between countries of written and customary law, has established one consistent, uniform and comprehensive code throughout the kingdom of France(*k*).

(*i*) See the edition of Pothier's *Traité des Obligations* collated with the new code *préf.*

(*k*) See *Redman's Translation of the Commercial Code; Azuni's Mar. Law*, *v.* i, *p.* 394, 395; and *Hoffman's Course of Legal Study*, *p.* 229.

Pothier had no taste for public life, nor any of those qualities which lead to political distinction. In 1747 he was appointed *échevin*(*l*) of his native city; but he had no sort of aptitude for this office, and therefore attended very little to its functions. By this neglect he lost nothing in the estimation of his countrymen, because they knew him to be more usefully and honorably engaged in those pursuits, where his talents, information and activity were most distinguished.

Assiduously employed, then, in fulfilling the duties of a judge and professor, in illustrating the laws of his country and in acquiring the most durable reputation as a jurist, Pothier lived to the advanced age of seventy three years, enjoying almost uninterrupted health through life in consequence of his temperance and regularity of manners. He died March 2d, 1772, after a short illness of six days, of a lethargic fever. His death was universally regretted, all his fellow-citizens striving to show their respect for his memory. As a particular distinction public services were performed on his account in the principal church of the city, to which the several corporations were invited, and his epitaph was engraved on marble in letters of gold by order of the municipal authorities: a mark of esteem almost unexampled, which, however, his extraordinary merit was thought to claim(*m*). Eulogies were also pronounced on his character in the presidial and university(*n*).

(*l*) The word *échevins*, in low Latin *scabini*, denotes the municipal officers established in many cities and boroughs to superintend the affairs of the corporation. *Encyclopédie Méthod. Jurisprud., au mot Echevin.*

(*m*) His epitaph is in the following terms:

Hic jacet Robertus Josephus Pothier, vir juris peritia, æqui studio, scriptis consilioque, animi candore, simplicitate morum, vitæ sanctitate præclarus. Civibus singulis, probis omnibus, studiosæ juventuti, ac maxime pauperibus, quorum gratia pauper ipse vixit, æternum sui desiderium reliquit, anno reparatæ salutis MDCCLXXII, ætatis vero suæ LXXIII.

Præfectus et Ædiles, tam civitatis nomine quam suo, posuere.

(*n*) The first by M. Le Trosne in French, the second by M. Breton in Latin.

The death of the good and great can never be otherwise than premature ; and that of Pothier, long as he had lived, was unquestionably a national calamity ; for he died in the midst of his usefulness, his faculties unimpaired, and his legal writings and designs but half finished, without leaving behind him his equal as an upright and indefatigable lawyer. Regarded, with reason, as a legal authority, he was not only useful in the capacity of a judge, a professor and a writer, but he was universally consulted by magistrates and others in different parts of the country by letter, or in his house by persons belonging to the province, for the determination of abstruse points of law. His residence was a sort of public tribunal, where an infinite number of suits was prevented by his counsels and interference. His correspondence was prodigiously extensive, and would, alone, have entirely occupied a person less highly gifted than himself with talents, application and legal ardor.

On the bench he constantly exhibited, in an eminent degree, a zeal for the support of justice, a disinterestedness of exertion, an untainted integrity, an assiduity of attendance, despatch in the conduct of business and promptitude in arriving at the solution of difficulties, which plainly marked him out among all his associates in the presidial. His fondness for expedition sometimes drew upon him the reproaches of advocates ; for if they wandered from the point or maintained false principles, he could not restrain his impatience nor avoid interrupting the discussion. Such a proceeding would not, of course, be well received by advocates ; although it would obviously tend to the furtherance of justice. Another peculiarity in his manner as a judge was the rapidity with which he could see through the merits of a case, before inferior minds were able to comprehend even its nature. To persons of ordinary capacity the quickness, with which a skilful judge makes up his opinion on the matter in dispute, appears hasty and rash ; they cannot conceive of his penetrating the obscurities of an intricate ques-

tion as it were at a glance; their own experience of the manner of understanding such a question affords them no precedent for any thing but slow, gradual, elaborate investigation. But it is this rapidity of decision, which distinguishes the superior mind. That is a powerful intellect, which, with apparent ease, grasps the most profound and diversified truths, separates them from the technical subtleties with which they had been mingled, overleaps the trivial doubts and factitious obstacles, by which weaker minds are confounded, and presents to us, at once, the desired principle divested of unimportant circumstances, of errors and of obscurities. Such a faculty has belonged to the most eminent judges, and in none has it been more remarkable than in Pothier.

In criminal trials it was always requisite to avoid assigning him cases, in which the application of torture might become necessary, as he could not bear the spectacle: a physical weakness, which, no doubt, was greatly confirmed by his conviction of the cruelty, injustice and absurdity of torture as a means of obtaining evidence or eliciting a confession. In every other respect he performed all the duties incumbent on his station with alacrity. Nor can we readily censure him for declining to make use of an instrument, which nothing but an age of barbarism could have produced, and inveterate prejudice retained so long in existence.

Pothier's industry was astonishing, and it is scarcely credible that he could write so many learned and elaborate works, considering how much he was occupied by his place in the university and his judicial functions, and how much he was interrupted by continual visits and letters for the purpose of consultation. But he had a surprising memory, great facility of exertion, and such an ardent love for jurisprudence, that he was never unprepared for any duty connected with his profession. All who came to seek his advice he heard with patience, and answered with such propriety and good sense, that none could

leave him without satisfaction. Sparing of his time for the purposes of amusement, he was prodigal of it for those of utility. Possessing the talent of leaving an employment and resuming it again with equal facility, he was able to pay attention to many different subjects in the day without confusion or distraction. He quitted his studies without fatigue of mind, because, although constantly engaged, he applied himself with moderation, and never continued his studies during the night. His supper, which he took at seven, closed the labors of the day, and left him at leisure for the society of his friends.

In the course of his long life, a short journey to Rouen and Havre was almost the sole interruption, which he voluntarily made, in the regular routine of his pursuits. While he was composing his great work on the Pandects, he was obliged to withdraw for a short time from his business, and retire to Lu(*o*), for the benefit of repose and solitude. After he was appointed professor, he commonly spent the vacations at the same place, and was most assiduously employed at a time which others devoted to relaxation. Many of his treatises proceeded from Lu. His only amusements there were short walks after he had dined or supped, occasional visits, and riding on horseback, an exercise for which he acquired great partiality.

He never indicated the least disposition to marry, saying that he had not sufficient courage for it, and that he wondered at those who had; thinking, besides, that celibacy was the wisest course for one who was frugal of his time and was exclusively devoted to tranquil and studious retirement. That he was thereby enabled to execute more is indubitable; since the very felicity of a married life would have drawn him away from less agreeable occupations, and diminished his opportunities for extended usefulness. No person ever availed himself more fully of his exemption from the cares of a family; for he was

(*o*) Lu is a town belonging to the dutchy of Montferrat in the north of Italy.

too careless of money and indifferent to the means of increasing his property, to attend to the management of his domestic affairs. He gave it up altogether to his servants, who governed his house, directed its expenses and relieved him from every thing which did not indispensably demand his personal interposition. The same disregard of domestic concerns appeared, also, in his exterior, which was always neglected, and in his cabinet, where all his books and papers were thrown about in the greatest disorder. A man of such habits would obviously never seek after riches. This indifference for wealth did not proceed from the greatness of his fortune, which, however was sufficient for his purposes; but from the disinterestedness of his character. In fact, he considered his superfluous possessions the patrimony of the poor as much as of himself; and therefore his charities were unwearied and boundless; he denied himself all the luxuries of life, and sometimes almost its necessaries, that he might have the more to give in alms; so that the inscription over his grave was literally true, that, for the sake of the poor, he himself submitted to live in poverty.

Although second to none in that essential politeness of the heart, which consists in being indulgent towards the faults, and scrupulous of injuring the feelings, of others, he was destitute of all exterior politeness and elegance of manners acquired from intercourse with polished society. His diffidence was excessive and always rendered him timid and embarrassed in the company of strangers. His body was tall in stature, but ill-connected; in walking, it inclined on one side, and his gait was singular and inelegant; he sat with his legs twisted together in the most ungainly manner; and there was a peculiar awkwardness in his whole figure, conduct and deportment. His manners were, therefore, so little prepossessing, that a transient acquaintance would have tended to weaken, rather than confirm, a person's respect for his character; and although

the goodness of his heart and simplicity of his feelings would soon become apparent to strangers, it would be long, before they would perceive any thing in his appearance answerable to the greatness of his reputation.

In society he was affable, among his friends remarkably open, and always tranquil, serene and even-tempered. In a circle of his intimate associates, his countenance became lighted up with animation, and he would unbosom himself to them with a simplicity, that was the more striking in a man of his superior talents and acquirements. Contention or dispute he never sought after; but he was not displeased with others for opposing him, and generally examined the objections made to his opinions with calmness and temperance. Sometimes, but rarely, he suffered a hasty expression to escape from him in the heat and vivacity of debate, which his heart disavowed, and which was unlike the usual mildness of his deportment. It was always, however, advantageous to discuss a subject with him, because, when excited, he would enter into the question fully and heartily, and consider it with the greatest ingenuity, learning and acuteness. He seemed to argue with persons in conversation, as he would controvert the sentiments of an author, apparently without any motive or interest but that of discovering the truth.

In short, the personal character of Pothier was entirely amiable; and his countenance indicated the suavity of his manners and the tranquillity of his soul. Seeking neither preferment nor riches; ambitious only to acquit himself honorably in the station where his birth, taste and fortune placed him; modest, unassuming and kind; uniting dignity with simplicity of feelings; appearing affable, obliging and easy of communication; to the most faultless probity of principles joining unexceptionable regularity of conduct; living a simple and uniform life unruffled by passion; beneficent and charitable to the utmost extent of his means;—he showed that all his

actions were dictated by the sincerest attachment to the duties of morality and religion(*p*).

(*p*) The materials, from which this life was composed, may be found in the *éloge* of Pothier, pronounced by M. Le Trosne and prefixed to the quarto edition of Pothier's works; in the *éloge* by M. Leconte, printed in the duodecimo edition of Pothier; and in the Latin discourse by M. Breton, prefixed to the second edition of the *Pandectæ*. We have not been able to procure a life of Pothier by M. Jousse, published at Paris in 1772, and referred to in *Hauboldi Institutiones Jur. Rom. Litterariæ*.

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MARITIME CONTRACTS

OF

LETTING TO HIRE.

PART I.

ON THE CONTRACT OF

CHARTER-PARTY OR AFFREIGHTMENT.

ON THE

CONTRACT OF CHARTER-PARTY

OR

AFFREIGHTMENT.

PRELIMINARY ARTICLE.

1. The contract of charter-party is a contract for the hiring of ships or vessels.

Boyer,(1) president of the parliament of Bourdeaux, in the sixteenth century, gives us the etymology of the term charter-party. He says(*a*) it was formerly the custom in Aquitaine and England, to reduce agreements into writing on a chart, afterwards divided from top to bottom into two pieces, one of which was given to each of the contracting parties, who produced them and put them together, when there was occasion to examine the terms of the contract. By the correspondence of the respective parts, they could ascertain the genuine original on which the contract was written, and thus defeat the designs of counterfeiters.(2)

This contract is also denominated affreightment, from the word *freight*, which signifies the hire agreed to be paid for the use of a ship. A freighter is one, who hires a ship to convey his merchandise to any particular place.

On the coast of the Mediterranean this contract is termed *naulis*, from *naulum*, which denotes the price a person agrees to pay for his passage, or for the conveyance of merchandise in a ship to any particular place.

(*a*) *Decis.* 105, n. 7 & 8. *Per medium charta incidebatur et sic fiebat charta partita.*

2. Ships may be hired for different purposes. Thus fishermen hire barks for the fishing business; in terms of war a vessel is hired by corsairs for a cruise; and a person may hire a place in a ship to pass from port to port.

The most ordinary purpose, for which ships are hired, is the conveyance of merchandise. The letter of a ship usually engages to make this conveyance for the merchant.

Of this species of contract we now propose to treat.

3. It may be defined to be a contract by which a person lets a ship, in part or in whole, to a merchant for the conveyance of his goods; the letter engaging to transport them in his ship to the place of their destination for a certain sum, which the hirer reciprocally engages to pay the letter as freight, that is, for the hire of the ship.

4. A ship may be let to hire in whole or in part.

Hiring a ship in part is either by the quintal or the ton.

The quintal is a hundred weight. To hire a ship by the quintal, is to hire her for the lading and conveyance of so many hundred weight of certain goods.

The marine ton is a space of forty two cubic feet.(*b*) To let a ship by the ton, is to let a merchant the space of so many tons, therein to lade and convey his merchandise.

The letting of ships to hire, whether by the quintal or ton, is done in two ways, either purely and simply, or on condition that the letter shall find in a certain time other freighters to complete the lading of the ship, which is called letting to hire by collection.(3)

Valin(*c*) considers the condition accomplished, when the master has procured goods to fill up three quarters of the ship. On the other hand, if, in the time agreed on, enough to load three quarters of the ship is not found, the contract becomes void *defectu conditionis*, and therefore the master is not bound to

(*b*) Marine Ord. *des navires*, art. 5.

(*c*) Valin, *Commentaire*, i. 640.

receive on board the goods of the freighters, who must look elsewhere for a conveyance.

Two different ways of making charter-parties or hiring ships may likewise be distinguished, namely, for the voyage or by the month.

A vessel is let for the voyage, when the freight agreed on is a certain sum for the whole voyage.

A vessel is let by the month, when she is let for so much every month the voyage lasts. The time does not begin to run before the day when the ship sets sail, unless it is otherwise agreed by the parties.(*d*)

5. This contract, in whatever manner it is made, being a true contract of hiring, all the general principles established as to the contract of hiring in my treatise on that subject, will be applied in the course of the present work. And we shall explain the rules belonging to the contract of charter-party, which occur in the Marine Ordinance.

To proceed systematically, we shall divide this first part into four sections. The first will be concerning the substance and form of the contract. The subject of the second will be the obligations contracted by the letter to hire, and the actions thence arising. In the third will be considered the rights of the freighter with regard to the ship he has hired, and his obligations. In the fourth we shall speak of the dissolution of the contract.

(*d*) Marine Ord. *chartes-part.* art. 5.

SECTION I.

Concerning the substance and form of the contract.

ARTICLE I.

Of the substance of the contract.

6. We have established, as a general principle, in the treatise of the contract of hiring, that three things form the substance of the contract of hiring; *first*, a thing to be hired and a use of this thing for which it is hired; *secondly*, a hire; and *thirdly*, the consent of the contracting parties as to the thing hired, the use for which it is hired and the hire.

According to this principle, three things constitute the substance of the contract of charter-party. *First*, a ship which may be let to the freighter, and a conveyance to be made in this ship of the freighter's goods to some place, which is the use for which the ship is hired. *Secondly*, a freight, that is to say, a hire of the ship agreed on between the parties. *Thirdly*, the consent of these parties, as well with regard to the ship and the use for which she is hired, as the freight.

On the first of those things, which constitute the substance of this contract, we shall say nothing; but the second and third will be summarily considered.

7. I. There can be no contract of letting to hire without a hire; for if one granted another the use of a thing without demanding any price, this would not be a letting to hire, but a gratuitous loan.(*e*) Hence it follows that the contract of charter-party, being a contract for the hire of a ship, cannot exist without some freight to be paid by the shipper. If the captain of a privateer undertake to convey to a certain place, in his ship, a cargo of merchandise for his friend, without exacting any freight, this would not be a contract of hiring, nor consequently a contract of charter-party, but a contract of mandate.(4)

(*e*) *Traité de louage*, n. 32.

All that we have said heretofore on the price of hiring or hire naturally applies to freight.

8. Although the parties generally explain themselves as to the sum intended for freight, still if a merchant lade his goods in the sight and with the knowledge of the master, without any explicit statement of freight, the contract is nevertheless valid, and the parties are considered as having tacitly agreed on a freight at the price usually paid for merchandise of a like quality at the time and place of the shipment.

If the price vary, the merchant is to pay the mean price, and not the least, as some authors have thought.(*f*)

9. There is a case, in which the freight, when not expressly stated, is accommodated to the highest price; and that is when the goods were put on board without the knowledge of the master. As he might then land them before his departure, he can exact the highest price for freight if he voluntarily convey them to their destined port. Such is the decision of the Ordinance.(*g*)

10. II. The consent of the parties contracting evidently belongs to the substance and essence of this, as of all other, contracts.

This consent should take place with regard to the ship, the goods to be laden, the place to which they are to be conveyed, and the price of freight. Otherwise, if a merchant ship his goods without the master's knowledge, there is no contract for want of consent, and of course no obligation on either side. And therefore the master, who finds merchandise in his ship without having consented to let her for that merchandise, may disharge it on shore.(*h*)

This may be done even when the merchandise does not overload the ship; for it ought to be in the power of the master to put on board his vessel only such a cargo and such goods

(*f*) Pothier, *Contrat de la vente*, n. 28.
(*g*) *Du fret*. art. 7. (*h*) Ordin. *Du fret*. art. 7.

as he thinks proper, and to let her only to such persons as he thinks proper.

The Ordinance does not say at whose expense the master of the ship may land the goods; but it should clearly be done at the charge of the merchant, who clandestinely put them on board, and from whom the cost of unloading may be demanded.

For the same reason the master is not obliged to sign a bill of lading for the merchandise.

11. When the master, on preceiving that goods have been put on board his ship without his knowledge, proceeds to sea in that condition, he is deemed, by thus knowingly retaining the goods, to have consented to let his ship for their conveyance at the highest freight similar merchandise bears in the market; and the merchant, on his part, is deemed to have agreed to give this freight by loading his goods without the master's knowledge: this mutual consent, which is presumed, is enough to constitute a contract of charter-party.

12. Suppose the master did not perceive the goods till after he set sail: may he land them in the first port at which he happens to touch? Valin(*i*) makes a distinction in this respect. If the goods overload the ship, he can, after taking advice of the ship's company, land them, provided he leave them in the hands of a solvent person and notify thereof the merchant to whom they belong; but if the goods do not overload the ship, they shall not be discharged on the passage.

He had a perfect right to land them before his departure, because the affair was then *res integra*, and he would restore the merchant to the same situation in which he was before the goods were put on board. But when the goods are gone to sea, it ceases to be *res integra*, and the master is bound to carry them to the end of the voyage. This obligation does not arise from the contract of charter-party; since the master, having been

(*i*) *Commentaire* i. 647, 648.

ignorant at the time he set sail that the goods were on board, cannot be presumed to have consented to let his ship for their conveyance; and of course there could have been no contract: but this obligation grows out of the law of nature, which, commanding us to cherish mutual good-will, and exercise beneficence, forbids our doing a thing, which, although in itself permitted, would cause considerable loss to another without affording us any considerable advantage. Thus, although the discharge, which the master might make in his passage, of goods put on board without his knowledge, should be permitted in itself, since he never engaged to make the conveyance; still he ought not to make a discharge, which would procure him no considerable advantage, because it is supposed that his ship is not overloaded, and which would do considerable damage to the owner of the goods, who might be unable to find another ship to convey them to the place of their destination. Besides, if the merchant is chiefly in fault for having loaded the merchandise without the master's knowledge, the master himself is not exempt from blame in neglecting to examine, before he set sail, the goods on board his ship.

What we have said is applicable only to the case in which the ship was let to several persons by the ton or quintal; but, if she were freighted altogether by a single merchant, the master would be justifiable in landing, at the first port he should enter, goods shipped without his knowledge; for if the goods are such as would injure the sale of the freighter's goods when carried to the same market, the master has an interest in leaving them behind; because if he should convey them to the place of their destination without the consent of a merchant who had chartered the whole ship, the master would be answerable for the damages(5) suffered by the charterer.

ARTICLE II.

Of the form of the contract of charter-party.

13. What the Ordinance prescribes, as the form of the contract of charter-party, concerns only the proof, not the substance of the contract; it becomes perfect and valid by the sole consent of the parties contracting: although it should not have been reduced to writing, their obligations are not the less fixed in equity; and even in a court of justice, for default of evidence, each one may tender the other a decisory oath(6) on the contract and the conditions it comprises.

14. The Ordinance declares,(*k*) in the first place, that a written instrument for charter-parties shall be made; it thereby excludes parole evidence; but by the words *shall be reduced to writing* it leaves the parties a choice of executing this instrument in the presence of a notary or under private signature.

Valin remarks on this article, that a notary is not indispensable; and that, if the master cannot write, the broker, by whose agency the business is negotiated, may subscribe for the master; for that, although brokers are not properly public officers, still, as they are commissioned by the admiral and sworn in court, custom and the good of commerce have established that their signatures should supply the place of that of parties who cannot write, and should be good evidence.

It is astonishing that Valin should have supposed that there are masters who cannot write; on the contrary, one article of the Ordinance,(*l*) which purports that no one shall be master without undergoing an examination, and another,(*m*) which requires the master to keep a journal, alike take it for granted that he can write; and so does Valin himself(*n*) in another place.(7)

(*k*) *Des chartes-part.* art. 1. (*l*) Liv. ii, tit. 1, art. 1.
(*m*) *Ibid.* art. 10. (*n*) *Comment.* i. 455.

The same author informs us, that the hiring of small vessels which coast from place to place, and especially of those within the jurisdiction of the same admiralty, is not reduced to writing, and that it is esteemed sufficient to remit the captain an invoice containing a memorandum of the goods and the sum to be paid for freight, which is addressed to the consignee.(o)

15. The Marine Ordinance(p) enumerates the contents of an instrument of charter-party in the following words. *The charter-party shall contain the name of the ship and of the port to which she belongs, the name of the master and that of the freighter, the place and time of loading and discharge, with what concerns delays and stoppages; and the parties may add thereunto all other conditions on which they agree.*

Although it may be well for a charter-party to contain every thing mentioned in this article, still the omission of either of these particulars will not vitiate the contract: which follows from the succeeding article, where an instrument of charter-party is supposed binding which took no notice of the time of loading and discharge.

16. In execution of the contract of charter-party the master of the ship ought to give a bill of lading, that is, an acknowledgment of the goods he has received on board the ship and of the conveyance he undertakes.

These instruments are called on the coast of the Mediterranean, policies of lading.

The Ordinance(q) requires that bills of lading should be signed by the master or by the clerk.(8)

The signature of the clerk, when there is one, binds the master; the clerk becoming in this respect the master's agent. It likewise binds the owners of the vessel as much as if it were the signature of the master himself.

When the master has shipped goods on his own account, as

(o) *Sur l'Ordonnance*, i. 618. (p) *Chartes-part.* art. 3.
(q) *Connoisse.* art. 7.

he cannot give himself a bill of lading, he should take one signed by the clerk and pilot.

17. The Marine Ordinance(r) requires the bill of lading to contain *the quality, quantity and mark of the merchandise, the name of the shipper and of the consignee, the places of departure and discharge, the name of the master and of the ship, with the price of the freight.*

Quality should be understood of the generic and exterior quality, for instance so many bales of cloth, so many cases of indigo; but it is not necessary to say the indigo is dry and well-conditioned, nor that the cloth is of such a particular sort; and even if this were mentioned, the master would perform his contract by producing the specified number of cases of indigo or bales of cloth marked with the freighter's mark; the merchant is not permitted to prove the cloth or indigo different in quality from what is stated in the bill of lading, because the master is under no obligation to know that circumstance.

Quantity denotes so many cases, so many bales, &c. Sometimes the weight of the cases or bales is added; but if the master have not verified the weight, he subjoins to the signature of the bill of lading, the words *without approving*, or *as said to be;* and the freighter cannot oppose this restriction, nor exact a pure and simple signature, unless he offers to verify the weight at his own charge in the master's presence.(9) Observe however, that, if the master be not obliged to render the precise weight mentioned in the bill of lading, he is at least obliged to produce the packages and chests full and well-conditioned, under pain of being answerable for the damage of the merchant.

The mark of the goods should be specified as a mean of ascertaining whether the bales or cases, delivered at the port of discharge, are the same which had been shipped and that others have not been substituted.

(r) *Des connois.* art. 2.

The name of the shipper, that is, of the merchant who shipped them, *and of the consignee*, that is, of the person to whom they are sent at the place of their destination, are required; but if there should be some error in these names, it is of no consequence, provided the persons are otherwise plainly designated.

When there is an instrument of charter-party, it is useless to mention *the price of the freight* in the bill of lading; and this price, if found in neither of the papers, is to be governed by the rules laid down in the preceding article of this section.

By the Ordinance(*s*) bills of lading should consist of three parts, one of which remains with the shipper, another is sent to the consignee of the goods and a third is retained in the hands of the clerk or master.

We shall hereafter consider how far a bill of lading is evidence.(10)

SECTION II.

Of the obligation, which the letter contracts by the contract of charter-party, and of the actions thence arising.

18. The chief obligation incurred by the letter to hire, and one which grows out of the nature of his contract, is that he enable the hirer to use the thing hired for the purpose intended by the parties: as we have seen in considering the contract of hiring.(*t*)

According to this principle the owner of a ship let to hire promises the freighter the use of the ship to convey his goods to the place of their destination; which is the purpose for which the ship is hired.

19. The master of the ship being authorized by the owners to make contracts relative to the ship, he is usually the letter to hire who contracts this obligation.

(*s*) *Des connois.* art. 3.

(*t*) *Du Contrat de louage*, part. ii, ch. 1.

There is a difference between the case in which the whole ship is hired by one person, and that in which she has been let by the ton or quintal. We shall treat of this difference in one article; in another explain the several heads of the obligation contracted by the master in whatever form the ship is hired; and in a third describe the action *de conducto* against the master and the action *exercitoria* which may be had against his principals.

ARTICLE I.

On the different obligations contracted by the letter to hire of a ship in the case when the whole ship is hired by one person and in that when she has been let by the quintal or ton.

20. When the whole ship has been chartered by one person, the master is bound to afford him the use of the ship entire and exclusive of all other persons during the continuance of the voyage. If the goods of such freighter do not complete the lading, which the ship is able to carry, the master cannot grant another person the room left without the consent of the freighter: according to the decision of the Marine Ordinance.(*u*) The charterer is entitled to the full enjoyment of the ship he has hired; and is not obliged to have her carry more than he thinks fit; and the master has no right to complain, provided he receives merchandise enough to secure the freight.

21. Even if the freighter, after making his contract, gives the master permission to fill up the ship with the goods of a stranger, it is only upon condition the master account to him for the freight; for as the charterer hired the whole ship, all her profits belong to him, and of course the freight she may earn by conveying any other person's merchandise.

The Ordinance is of this import where it says:(*v*) *if a person,*

(*u*) *Du fret.* art. 2. (*v*) *Ibidem.*

who has hired the whole ship, do not give her a full cargo, the master cannot complete her lading with other goods, without the consent of the charterer, nor without accounting to him for the freight.

The concluding words, *without accounting to him for the freight,* relate to the case in which the freighter has granted the master leave to take on board other goods to complete the lading; if the freighter withhold his permission, the master has no right to ship the goods of another person; and if he should ship them, the freighter may compel him to discharge them on shore. Besides, the master, in shipping the goods of other merchants without the charterer's knowledge, exposes himself to an action for damages, in case any such improper shipment should injure the sale of the charterer's merchandise.

22. The master is not only forbidden to take in goods belonging to strangers, but even to lade any on his own account, without the charterer's consent.

When the charterer has permitted the master to lade goods on his own account, without expressly requiring freight, is freight due? Valin maintains that it is not, although he concedes that the freight of goods should be accounted for, which the master has been allowed to take on thirds without an express agreement as to the freight; but as the same reasons appear applicable to both cases alike, I do not think Valin's opinion ought to be followed; and I am assured it is not conformable to the usage of merchants.

23. If the goods of the charterer complete the ship's lading, it is still less allowable for the master to overload her, with his own or any other merchandise; and if he do, he ought to be rigorously held to answer for the damage suffered by the charterer.

24. A person who has freighted the whole ship, being entitled to the full enjoyment of her and her profits, of course the master must account to him even for the trunks of passengers;

but the master need not ask permission to receive them; the consent of the freighter is presumed, because it is for his interest to have passengers on board the ship to defend her in case of necessity.

25. It is otherwise when the ship has not been let entire, but by the quintal or ton. Here it suffices for the master to receive the goods which he has engaged to receive, or to furnish such accommodation for the freighter's goods as he has engaged to furnish. In both cases he may dispose of the surplus of the ship as he pleases.

ARTICLE II.

Of the particular obligations contracted by the letter of a ship to hire, in whatever form she was hired.

26. In whatever manner the contract is made, whether the ship be let in whole or in part, by the quintal or ton, the general obligation of the master to give the freighters full enjoyment of the ship for the purpose of conveying their merchandise, comprehends seven heads of obligation growing out of the nature of the contract, beside those arising from particular clauses.

27. I. The master, who has let a vessel to hire in whole or in part, engages to oppose no hindrance to the lading of the freighter's merchandise.

Not only is he bound to oppose no hindrance on his own part, but he must defend the freighter from any obstruction thrown in the way of lading or conveying the goods by the owners of the ship, or by those, who, pretending to be such, deny the master's right to let her to hire. The general principles of the contract of letting to hire govern this particular obligation.(*w*)

28. II. When the goods of a freighter are put on board the

(*w*) *Traité de louage*, part. ii, c. i, s. 2.

ship, the master ought to take them under his care, and charge himself with their keeping, by an instrument, of which we have already spoken, called a bill of lading.

29. III. As the master has engaged to transport the goods to the place of their destination, he is bound to set sail at the time agreed on by the contract. The judges, however, easily grant him a moderate delay, if any goods remain to be put on board at the expiration of the stated time.(*x*) When the time of sailing is not fixed by the contract, it should be left to the judge to decide according to the usage of commerce.

30. IV. The master is guarantee against any defects of his vessel, which, when she has put to sea, would render her incapable of conveying the goods to the place of their destination; and if any of these defects prevent or considerably retard the conveyance, he is responsible for the damages and interest of the freighter.

Such is the direction of the ordinance,(*y*) which says that *if the merchant can prove that the vessel, at the time of sailing, was incapable of performing the voyage, the master shall lose his freight, and answer for the damages and interest of the merchant.*

He is held, even if he should allege that he was ignorant of the defect; for his situation required of him to know and inform himself of such a circumstance. All this is conformable to the general principles established in the contract of letting to hire(*z*), respecting the warranty of those defects in the thing hired, which prevent its being used.

This obligation of warranty likewise exists, when the ship departs without being visited; for although carpenters and calkers in every port are commissioned to visit ships about to sail on a voyage, we have been assured that these surveys are often neglected on the sea-coast, and that a great number of ships go to sea without an examination.

(*x*) Valin, *Commentaire, charte-part.* art. 4.
(*y*) *Du fret.* art. 12. (*z*) *Traité de louage,* part ii, c. 1, s. 4.

Valin pretends(*a*) that, even if the ship had been visited before her departure, and reported free of any external defect, this warranty would remain, if the freighter could prove the ship to have had a latent and interior defect before she set sail, which rendered her incapable of performing the voyage, and which had not been discovered on the visit where only the exterior parts of the vessel were surveyed. I agree with Valin, that if this defect was or could be known by the master, such warranty should have effect in all its extent; and the master should be responsible for the damages and interest of the freighter; but if it was impossible to know the defect, the freighter cannot claim damages, but only a discharge from the payment of freight, conformably to the principles established in my treatise on the contract of letting to hire.(11)

31. V. The master is bound, both before the ship sails and on the voyage, to use reasonable care for the preservation of the goods on board.(12)

He is responsible even for a slight negligence, according to the nature of the contract of letting to hire.

He should be careful to have on board his charter-party and other documents concerning his cargo; which is expressly enjoined by the Ordinance.(*b*)

If in time of war the ship should be condemned as prize, on account of his failure to present the shipping-papers, it is unquestionable that he must answer for the damage and interest of the freighter; and in general he is liable for any other damage, which the freighter may have suffered in consequence of such a failure.(13)

32. Although the master is bound to preserve the goods of freighters laden in the ship, still, as necessity puts an end to every obligation, and is subject to no law, if it becomes necessary to lighten the ship for her safety, as when she is labouring in a storm, or is chased by a pirate or corsair, the master, hav-

(*a*) *Com.* i, 654. (*b*) *Charte-part.* art. 10.

ing taken advice of the ship's company and of all interested persons in the ship, may throw overboard such goods as he judges adviseable, with the condition that they, to whom the goods belong, receive an indemnity by contribution of all those interested in the preservation of the vessel.

This subject we shall treat of in the second part.

33. For the same reason of necessity the Ordinance(*c*) permits the master to sell the freighter's goods in the course of the voyage for the purchase of provisions, the repair of the ship or any other cause of pressing necessity, so far as that necessity extends.

Observe, *first*, that the master, in order to this, ought to take advice of the pilots and mates, who will attest the necessity of the borrowing or sale and the nature of its employment. *Secondly*, he should only make sale of the freighter's goods in the very last resort; and should rather borrow money on the ship if in his power; if not he should take the owner's goods, if he have any on board, in preference to those of a freighter; it being reasonable to apply the goods of an owner to what is more immediately his own affair. *Thirdly*, when the master has been constrained to make use of the goods of freighters, he should pay for them at the rate the rest sold for at the place of delivery.

34. These principles apply to the case in which the ship arrives safe in port. But suppose, after the master has sold goods of a freighter to supply the pressing necessities of the vessel, this vessel should be lost on the voyage with her whole cargo, or taken by the enemy: is the master bound to pay the freighter the price of his merchandise?

The ancient maritime laws decide in the affirmative. The Ordinance of Wisbuy(*d*) says, that *in case of necessity the master may sell a part of the cargo to raise money, if it is required by the situation of the ship, and should the vessel after-*

(*c*) *Capitaine*, art. 19, and *Fret*, art. 14. (*d*) Art. 68.

wards be lost, the master shall nevertheless pay the merchant for his goods. Valin(*e*) considers this decision just, and thinks it ought to be followed.(14) Experienced persons, however, whom I have consulted on the subject of my treatise, have declared that the owners of goods, sold for the necessities of the ship, can demand nothing for them if the ship perish. Apparently they found their opinion on the principle that, in the case of jettison, he whose goods have been thrown overboard for the common security ought not to claim an indemnity of those interested in the preservation of the ship, when she perishes on the voyage and of course eventually gains nothing by the jettison. I cannot easily coincide with this opinion; and I think the doctrine of Valin, and of the Ordinance of Wisbuy, more consonant with juridical principles.

There seems to me to be a wide difference between this case and that of jettison. In jettison the parties interested in the preservation of the ship have not received the price of the goods thrown into the sea; they are obliged to indemnify him, whose property was sacrificed, only by the maxim of equity *nemo debet alterius jactura locupletari;* and their obligation, having no other foundation, ceases when the event shews the jettison not to have been profitable. In the other case it is different; the obligation of the master towards the owner of goods sold for the pressing need of the ship, has another foundation; the master has received the price of the goods; now the price of a thing belongs to him to whom the things belongs; therefore in this case the price belongs to the owner of the goods and to him it should be restored. It is a species of forced loan, which the owner of the goods sold has made to the master, for the wants of the ship, and a loan of money belonging to him because raised by the sale of his merchandise. From this loan arises an obligation, which the master contracts, to repay the sum borrowed; and although it happens in the end that the loan was

(*e*) *Com.* i, 655, 666.

of no permanent benefit to him, it does not follow that he shall be released from his obligation.(15)

Has the owner of goods sold, an action against the owners of the ship to recover the price of his merchandise? I think he has an action. The owners cannot, in defence, allege that article of the Ordinance, which says that owners are responsible for the acts of the master, but that they may be discharged of their responsibility by abandoning the ship and freight. This rule applies only to those obligations of the master, for the relief of which he cannot call on his owner to indemnify him; for example, when the master has caused some injury to the goods of freighters by his own fault; this is an act of the master for which the owners are responsible, but only in the value of the freight; and therefore a total loss of the ship and freight puts an end to their responsibility; but this loss does not destroy the contract of mandate between them and the master nor any of the consequent obligations. According to the principles of the contract of mandate, the bad success of an affair, which constitutes its subject, unless proceeding from the misconduct of the mandatary, does not excuse the mandator from indemnifying the mandatary's expenses, nor relieve him of a single obligation contracted in execution of the mandate.(*f*) Of course the loss of the ship cannot excuse her owners from relieving the master against his obligation to reimburse the owners of the goods sold; this being an obligation, which the master was bound to contract for the pressing wants of the ship, and consequently *ex causa mandati*. Therefore the owners of goods sold, exercising the rights of the master, may, *celeritate conjungendarum actionum*, demand this price of the owners of the vessel.

The master, it should be noticed, contracts two species of obligations with the owner of goods sold for the use of the ship, one to repay him their price, another to give him an in-

(*f*) *Digest. l.* 56, *s.* 4 *mandat.*; *Cod. l.* 4 *d. tit.*

demnity for the gain he has lost by their not being carried to the place of their destination. It is evident that, when the ship perishes on her passage, the second of these obligations ceases; because the merchant, so far from having been deprived of gain by the premature sale of his goods, has thereby saved their price: but the first of these obligations remains in full force; it is enough that the master has touched the price of the goods in order to make its restoration indispensable.

35. VI. The master, on reaching the place of destination of the goods, must discharge and deliver them to the correspondent of the freighter to whom they are addressed.

He should deliver up every thing comprised in the bill of lading, by which he has taken charge of the cargo; if any thing appears wanting, he is responsible for it, unless he can show that some accident of superior force has caused its disappearance. If he cannot prove any such accident, he must answer to the freighter *in id quanti ipsius interest.* And as this *id quanti ipsius interest* embraces *non solum quantum abest, sed quantum lucrari potuit;*(g) the master, in consequence of his failure to produce the goods, is held for the profit they might have made as well as for their original cost; and he must pay the freighter at the rate for which he might have sold them, that is, at the rate such goods are worth in the port of discharge and delivery.

36. The master may deduct from this estimate the price of the freight, which the shipper would have owed for the goods, together with the duties and intermediate expenses to which the goods have been subject; for if the goods had remained on board the ship, the freighter would have profited from their sale only with this deduction; and therefore his damages ought to be calculated with this deduction.

37. If the correspondent of the freighter, to whom the goods are addressed, pretends that the goods delivered are not the

(g) *Digest. l.* 13, *rat. rem. hab.*

same mentioned in the bill of lading, or that any thing is deficient; and if the master, on the contrary, maintains that he has delivered every thing as contained in the bill of lading of which he is the bearer; and if there is in fact a difference between the bills of lading; which of them is to be considered decisive evidence? For instance, if the bill of lading with the correspondent purports that the master has taken charge of thirty two cases, and that in the hands of the master speaks of only thirty cases; will it be sufficient if the master produce thirty cases? The Marine Ordinance(*h*) makes a judicious distinction in this case. If the merchant freighter or his agent penned the bill of lading, then the bill of lading borne by the master in the hand-writing of the merchant or his agent is to be the master's guide; he is not obliged to produce any thing more than the bill of lading comprehends; and he may allege that he signed the other bill of lading incautiously and by surprise, trusting to the bill of lading which remained in his hands. But if the master himself wrote and filled up the bill of lading addressed to the consignee, this one is to be followed, and the master cannot complain of it; since it is his own hand-writing, he must produce its contents; and if that, which he holds, contains less, there must be presumed to have been some omission.

38. The master is bound, not only to produce all the goods entrusted to him by the bill of lading, but to produce them in the same condition that they were received on board, unless they should have been injured by a superior force. But if the goods were injured by the negligence of the master or of his agent, which is presumed when they are out of order, he must indemnify the freighter for at least their value; the consignee may even refuse to take them, and may leave them on the hands of the master, who would then be required to answer to the freighter in the same way as if he had failed to deliver the goods at all through his own fault.

(*h*) *Des connois.* art. 6.

If the consignee of the goods accept them without complaining of their condition, no claim can afterwards be made for damages.

39. When a dispute on the condition of goods, which the consignee maintains were injured by the master's fault, cannot be promptly decided, the master may demand a provisional payment of the freight, giving security or not, according to the seeming reasonableness or unreasonableness of the dispute. And the master must not fail to enter a protest in this case, so as to render the consignee liable for the charge of stoppage and delay, and generally for all his losses, provided the dispute was without good foundation.

40. If the consignee refuse to receive the goods for some reason which does not concern the master, for instance, because he does not approve their being sent to him; in such a case, after the master has cited him to show cause for his refusal, whether he give this cause or some other equally indifferent to the master, or whether he give none and make default, the master will obtain a sentence permitting him to sell so much of the property as will discharge the freight and to deposit the surplus in some magazine at the risk of its owner.

41. VII. When a storm or any other accident has compelled the master, for the common safety, to throw the whole or a part of a freighter's goods into the sea, the master is obliged *actione ex conducto* to recompense the freighter by means of a contribution, which the master must call on all concerned to make.(*i*) This obligation will be considered in the second part.

42. VIII. Besides these principal obligations growing out of the nature of the contract, the master enters into others dependent on particular clauses; when, for instance, he declares in the contract that his ship is of greater burthen that she really

(*i*) *Digest. l. 2, ad leg. Rhod.*

is, he is responsible for the damage to the freighter arising from want of room;(*j*) on the same principle that, when by the lease of a farm the lessor has overrated the quantity of land, he must answer to the lessee for the deficiency in extent.

In order that the master's declaration as to the burthen of his ship should be considered false, and that he should consequently be held for the damages of the freighter, the vessel must fall short considerably of the capacity represented. The Ordinance(*k*) decides that it should exceed the fortieth part; thus if the master declared the ship's burthen one hundred and twenty tons, unless the ship is of one hundred and sixteen tons or less, he cannot be called upon for damages.

43. In estimating the damages resulting from a deficiency of the tonnage, there should not be merely a retrenchment of freight in proportion to that deficiency, but the loss of the freighter in having been unable to convey to market the proposed quantity of goods ought likewise to be taken into consideration.

44. In the contrary case, when the master has represented his vessel to be of less than her actual burthen, if the freight was a certain sum for the whole vessel, there is no reason for claiming an increase of freight on account of the surplus capacity; because the vessel was let entire without any modification of the price stated in the contract. But if freight was promised by the ton, the shipper ought to pay for so many tons as his merchandise really occupied.(*l*)

ARTICLE III.

Of the action ex conducto against the master who lets a ship to hire and the action exercitoria against his employers.

45. From the obligations, which the letter contracts by the contract of letting to hire, and which we have detailed in the

(*j*) Ordin. *Du fret.* art. 4. (*k*) *Du fret.* art. 5.
(*l*) Pothier, *Du con. de vente,* n. 254, 255.

preceding article, arises the action *de conducto;* a personal action, which the freighter, who hires the ship, may have against the master, who lets her to hire, in order to compel the master to fulfil his engagements or else answer in damages for their non-performance.

46. Besides the action *ex conducto*, the freighter may have, against those who appointed the master, the action *exercitoria* for the same end with that *ex conducto*. It matters not whether those who gave the master command of the ship are the owners of the ship or only her primary hirers, who have a right to collect profits from her by means of underletting. *Exercitorem eum dicimus, ad quem obventiones et reditus omnes perveniunt, sive is dominus navis sit, sive a domino navem per aversionem conduxit vel ad tempus vel in perpetuum.*(m)

47. This action *exercitoria*, which the freighter has against the master's employer, is an extension of the action *ex conducto* against the master himself. It is founded on the general principles laid down in my treatise on obligations;(n) which are, that principals in appointing a master to the command of their ship, are considered as having consented beforehand to the contracts he should make for the employment of the ship, and as having acceded beforehand to all the obligations stipulated in those contracts.

48. Unquestionably the master binds his employers by letting the ship to hire in whole or in part without their knowledge, provided they are absent, and in this case the freighters may bring the action *exercitoria* against his employers. Is it the same with engagements entered into by the master while they are on the spot? Can he then bind them without their knowledge and advice? For the affirmative it may be said that the law *de exercitoria actione* declares,(o) in general terms, those, who have employed the master, answerable for

(m) *Digest l.* i, *s.* 15, *de exercitoria actione.*
(n) *Des Obligations*, n. 447, 456.
(o) *Digest.* 14. 1. 8 & 9. & 14. 1. 7.

all his acts, *omnia facta magistri debet præstare qui eum præposuit*, without distinguishing whether the master contracts at or away from their place of residence; that those, who contract with the master, being necessarily ignorant of his employers and of their residence, would be deceived if the master could not bind the ship nor her owners without consulting them; and that although the Marine Ordinance(*p*) says, that *the master must follow the directions of his owners when the vessel is freighted in the place of their residence*, it does not mean that the master cannot bind the owner in such a case, but only that he is responsible to them in damages for having neglected to take their advice.

It may be said on the contrary for the negative, that the maxim *omnia facta magistri debet præstare qui eum præposuit* is to be understood only of acts relative to business, of which the owner of the ship has entrusted him with the management; that the owner is not considered as giving him the direction of affairs which he can attend to himself; and therefore the owners are thought to have given him the power of letting the ship to hire only in their absence, and not when the place where the contract is executed is the place of their residence; because the owners in this case can make the contract in their own persons. The rule of the Ordinance would be nugatory, if it were in the power of the master to bind his owners in despite of this prohibiting article. They who have contracted with him ought to blame themselves for not applying to the owners, whom it is easy to find when they reside on the spot. Such are the sentiments of Valin.

If the master let the ship in the dwelling-place of the owners without their knowledge, the contract, it is true, does not bind the owners; but it is not the less valid, as between the master and the hirers, and it makes the master liable for their loss if he do not perform his engagement; as in all other con-

(*p*) *Chartes-part.* art. 2.

tracts of letting to hire the contract is valid although the letter has let a thing which did not belong to him and which he had no right to let.(16)

49. When it is not the master of the ship, but some agent, he has substituted without the knowledge of the owners to do business for him, who has let the ship to hire in whole or in part, does this contract bind the owners of the ship, who had given the master no power to appoint a substitute to act in his stead? The reason for the negative is drawn from the general rule that an attorney cannot substitute any one to do the business which he has undertaken, unless permission so to do is expressly granted by the power of attorney; otherwise he, who appointed the attorney, is not accountable for the doings of the attorney's substitute. Nevertheless the law *de exercitoria actione* decides against this general rule for the benefit of navigation. It declares that they, who have contracted with the substitute of the master, may bring the action *exercitoria* against the owners of the ship, even if the owners have not expressly consented to this substitute, nay if the owners have expressly foridden the master to appoint a substitute.(*q*) (17)

50. When the master of the ship is appointed by several, each of the principals is liable severally for the whole debt by the action *exercitoria*.(*r*) (18) This several obligation rests likewise on another foundation among us, to wit, the Ordinance of 1673, which renders partners in trade severally liable for the debts of the company.

51. There is a remarkable peculiarity relative to ship-own-

(*q*) The law says: *Magistrum accipimus non solum quem exercitor præposuit, sed et eum quem magister; et hoc Julianus in ignorante magistro respondit:* and then subjoins: *Quid tamen si sic magistrum præposuit, ne alium ei liceret præponere; an adhuc Juliani sententiam admittamus videndum est: finge et nominatim prohibuisse ne Titio magistro utaris: dicendum tamen est eò usque producendam utilitatem navigantium. Digest. de exerc. actione.*

(*r*) *Digest. de exerc. actione.*

ers. All other principals are held indefinitely for the obligations which their agent has contracted relative to the concerns of his commission; whereas ship-owners are held by the contract of the master only to the amount of their interest in the ship. Such is the rule of the Marine Ordinance, which says: *the owners of ships are responsible for the acts of the master, but they can be discharged from their responsibility by abandoning the ship and freight.*(s)

52. It remains for us to remark that, according to the Ordinance,(t) freighters have the benefit of a privilege on the ship, tackle and furniture, for all the money due them on account of the letting to hire, whether the contract was made by the owners or by the master they appointed. But their privilege is after other privileges. The claims of seamen for wages are preferred; so likewise are the claims of those, who have furnished money to equip the vessel, or for her necessities during the voyage.(u)

SECTION III.

Of the rights of the freighter with regard to the ship he has hired, and of his obligations.

ARTICLE I.

Of the rights of the freighter.

53. According to the principles of the contract of letting to hire, the hirer, as between him and the letter, has a right to enjoy the thing hired and to employ it in the uses for which it was hired.

We have already noticed that according to this principle, a freighter, who has hired a whole ship, ought to have the enjoyment of her during the time for which she was chartered; that

(s) *Des proprietaires*, art. 2. (t) *Chartes-part.* art. 11.
(u) *De le saisie des vaisseaux*, art. 16.

of course the master cannot receive any goods on board to fill up the ship without the freighter's consent; and that the master must account to the freighter for the freight of these goods or of passengers.

There is however this peculiarity with regard to the rights of freighters, namely, that they are forbidden to underlet the ship for a higher price than that for which she was hired, although hirers of other things may underlet them at an advanced price.

Such is the disposition of the Marine Ordinance, where it is said: *We forbid all brokers and others to underlet ships at a higher price than is stipulated in the first contract, under pain of a hundred livres fine and of greater punishment if there be occasion.*(v)

What the Ordinance says of *all brokers*, should be understood of brokers who have freighted a ship, as agents for some merchant, and have underlet her in the name of the same merchant; for brokers are forbidden to take ships on their own account.(w)

The Ordinance adds, *and others;* that is to say, generally all other freighters.

This prohibition comprehends all freighters, whether the ship was freighted in whole or in part; for the Ordinance makes no distinction.

The object of this regulation was to prevent monopolies, which persons might make by getting possession of all the ships and then exacting a great price from merchants who were anxious to have their goods conveyed to market.

54. The Ordinance says, *underlet at a higher price;* it is therefore lawful to underlet, provided it is not done at an advanced price. The charterer of a whole ship is likewise permitted to underlet a part of the ship to complete the lading;(x) for in such a case there is no suspicion of fraud.

(v) *Du fret*, art. 27. (w) *Des interpretes*, art. 13.
(x) *Du fret*, art. 28.

55. According to the principles of the contract of letting to hire, it is only as between the hirer and the letter and his heirs, that the hirer has a right to enjoy the thing hired; he who has acquired the thing by special title is not obliged to ratify the contract of letting to hire, unless he has engaged to do so in making his purchase.(y)

Hence if, after the execution of an instrument of charter-party, the owner sell his ship without requiring of the buyer to ratify the previous affreightment, the buyer is under no obligation to ratify it, and may prevent the freighter from lading his goods on board the ship. But the freighter in this case has an action for damages and interests against the owner with whom he contracted.

What if the freighter has already put his goods on board? In strictness of law it should appear that the purchaser might compel the freighter to unload; as the purchaser of a house may, unless it is otherwise agreed in the sale, turn out the tenant; still I think in this case the public interest of commerce should oblige the purchaser to ratify the affreightment, especially if he gave no notice of the transfer until the ship was on the eve of setting sail.

ARTICLE II.

Of the obligations of the freighter.

56. The chief obligation, which the freighter contracts by the contract of charter-party, is to pay the freight.

If he put on board a greater quantity of goods than the charter-party imported, he ought to pay an increase of freight in proportion.

57. Freight comprehends not only the principal sum agreed upon for freight, but also the perquisites of the master, such as wine, hose and hat-money. Clairat(19) informs us(z) what

(y) Pothier *Traité de Louage*, n. 288.
(z) *Des Contrats Maritimes*, t. 5, n. 18.

was meant in his time by the master's hose or wine-money. He says, *it is a present which the merchant freighter makes the master, over and above the freight, which present he appropriates to his own use without imparting any of it to the owners or the ship's company: it is usually as much as the freight of a ton.* The custom has changed since the time of Clairat: for this present is no longer made, unless stipulated by the contract of charter-party; and I have been assured that, according to the present usage, the master must account with the owners for this perquisite as much as for freight, unless the owners have relinquished it to him by express agreement.

Sometimes the freighter promises this sum under condition *that he is satisfied;* and the condition is thought to be accomplished, when the freighter cannot prove any just cause of dissatisfaction.(*a*)

58. Freight is due when the goods, for whose transport the ship was hired, have reached the port of discharge and have been landed; and of this case we shall treat in the first paragraph. When the goods have not reached the place of their destination, sometimes no freight is due, sometimes freight is due in part or in whole, as if they had arrived: these cases will be considered in the three subsequent paragraphs. A fifth paragraph will consider the case in which the arrival of the goods was only retarded. In a sixth we shall see when the freight may be demanded, and in what ways the letter to hire may obtain payment. Finally, a seventh will embrace some additional obligations of the freighter.

59. I. When the goods of the freighter have arrived at the port of discharge, the whole freight is due, how much soever they may be damaged by accident of superior force, and even if they are not worth the freight; the freighter cannot abandon them for the freight.(*b*)

(*a*) *Digest. l. 75, de legat.* 10.
(*b*) *Ordonnance de la Marine, Du fret.* art. 25.

This rule, whatever may be said of it by Valin,(20) is very just and conformable to the principles of the contract of letting to hire. It is sufficient, according to these principles, to make the whole hire due to the letter, that he has fully performed the obligation, which he contracted, to give to the hirer the enjoyment of the thing let to hire: now the master having transported the goods to their place of destination, it may be truly said that he has entirely fulfilled his obligation, and that he had enabled the freighter to enjoy the ship in the way intended, since this transport was the only use of the ship for which they contracted. If the goods are found greatly damaged and of no value, this is an affair which does not concern the master, because it is by means of an accident, against which he does not warrant, that they are reduced to this condition.

The force of Valin's objection consists in saying, that it is the same thing to the merchant whether the goods are so much damaged as to be useless, or absolutely lost; and as we should not demand freight if the goods were lost, by parity of reasoning we should not demand it when they are damaged, and the merchant offers to abandon them for the freight. The answer is, that it is on the side of the master, to whom the freight is due, that we ought to consider whether it amounts to the same thing to have the goods lost and fail to reach the port of delivery, as it is for them to be very much damaged. Now it evidently is not the same thing to the master: for when the goods are lost on the passage, not having been able to transport them to the place of their destination, he has not fulfilled the object of his contract, *munere vehendi functus non est;* and it is for this reason that the freight is not due to him; but when he has transported them, whatever damage they may have suffered, he has fulfilled the object of his contract, *munere vehendi functus est*, and by consequence is entitled to freight.

60. Nor is this contrary to the next article in the Ordinance,

as Valin imagines. *If goods put into casks,* says that article,(c) *as wine, oil, honey and other liquors, leak out so much that the casks are empty or almost empty, the merchant freighter may abandon them for the freight.* This species of goods, for the conveyance of which the ship was hired, is principally contained in casks, which are nothing but an *envelope* and accessory to the goods themselves; and when the casks are empty, the goods have ceased to exist; and if they have ceased to exist, it cannot be said that the master has conveyed them to the place of their destination. In this case, therefore, the master has not fulfilled his obligation, and the freighter ought to be discharged from the freight of empty or almost empty hogsheads, on abandoning the hogsheads with their remaining contents. On the contrary, in the kind of goods mentioned in the preceding article, the goods, to whatever extent injured, still exist, and the master has entirely fulfilled his engagement by conveying them to the place of their destination. Hence he is entitled to freight.

If among a parcel of goods, for the freight of which a certain sum was promised, some casks are found empty, and others not, is it enough for the freighter to abandon the empty casks in order to be discharged from the freight on them, or must he abandon the whole parcel of merchandise? Having caused inquiry to be made in a port, on the sea-shore, relative to this question, I received for answer, that the old admiralty laws required the abandonment of the whole parcel; but that the law was now changed, and it sufficed to abandon the empty casks in order to be discharged from the freight on those casks; and this last doctrine seems to be the most conformable to juridical principles. Although a certain sum was agreed on as the freight of the whole parcel, still this sum is divisible and may be apportioned among all the casks which compose the parcel. Each cask therefore owes its part of the freight, and,

(c) *Ordonnance de la Marine, Du fret,* art. 26.

when it is lost, the freighter ought to be discharged from the part due on it: now a cask is esteemed as lost when it is empty or almost empty; and therefore the freighter, on abandoning it and the little which remains in it, ought to be released from freight on it, without being compelled to abandon the surplus of the lot of merchandise.

This article of the Ordinance takes effect, when the leakage of the goods happened in consequence of accidents of superior force.

If it was in consequence of an act of the master or of his servants, from their failing to exercise due care in the preservation of the goods, it is plain that he would lose his freight, and also be liable to an action for the damage and interest of the merchant resulting from the loss of his goods.

What if the leakage was occasioned neither by the fault of the master nor by any accident of superior force, but by the vice of the casks: would the rule of this article take effect and would the freighter be discharged from his freight on abandoning that which remains? Valin maintains the affirmative, because, says he, the case of damage by the vice of the goods or of the casks, and the case of damage from superior force, being both expressed in the preceding article, ought to be understood in this, which has relation to the preceding and forms an exception to its provisions. This opinion of Valin appears to me contrary to the principles of law. It is the fault of the merchant if he has put his goods into bad casks; it is his fault if they have leaked out and so have not arrived at the place of their destination; he therefore ought to pay freight; for according to the principles of the contract of letting to hire, the hirer, who by his own act or fault has not enjoyed the thing let to him, ought to pay the hire, as much as if he had enjoyed it. If the letter, who has been prevented from letting to other persons the place occupied by the bad casks, should not be paid the freight, he would suffer for the fault of the hirer; which is unjust.

61. II. It is evident that no freight is due, when, by the act or the fault of the master, the goods shipped have not reached the place of delivery, where the master had engaged to convey them; on the cotrary the master is held for the damage and interest of the shipper.

62. When it is not by the act of the master, but by some accident of superior force, for instance by an interdict of commerce with the country where they are to be conveyed; if this accident happened before the departure of the ship and broke up the voyage previous to its commencement, in such a case no freight is due.(*d*)

63. When the goods are lost on the passage or when they have been taken or pillaged, is the shipper released from his obligation to pay freight, or is a part due? The reason for doubting is, that according to the principles of the contract of letting to hire, when a hirer is prevented by superior force from enjoying the thing hired, it is true he is discharged from the payment of hire for the future, but he owes it for the time that he enjoyed the thing without hindrance. Now it may be said, the freighter, whose goods have perished by shipwreck or a similar accident of superior force on the passage, has occupied the ship with his goods during a part of the voyage, and therefore owes freight up to this time; that is, freight is due in part.

This was the opinion of Straccha;(*e*) who thinks the law should be understood in this sense, where it is said:(*f*) *Quum quidam nave amissa vecturam, quam pro mutua acceperat, repeteretur, rescriptum est ab Antonino Augusto, procuratorem Cæsaris ab eo vecturam repetere, cum munere vehendi functus non est: quod in omnibus personis similiter observandum est.* This author explains the passage to mean, that a return of freight might be demanded for the part of the voyage which remained to be per-

(*d*) *Ordonnance de la Marine, Des chartes-part.* art. 7.
(*e*) *De Navibus*, p. 3, n. 24. (*f*) *Digest. l.* 15, *s.* 6. *locat.*

formed, *cum munere vehendi non sit functus*, for this part; and that freight was acquired for the part of the voyage made by the ship.(21)

Whatever may be the sense of this law, the Marine Ordinance, which is our law, decides that no freight is due in this case, and that the merchant is wholly discharged from its payment. *No freight is due,*(*g*) are its words, *for goods lost by shipwreck or running aground, pillaged by pirates, or captured by enemies; and, if there is not an agreement to the contrary, the master is bound in such a case to restore that which may have been paid him in advance.* The reason is, that affliction ought not to be heaped upon affliction; the shipper having been so unfortunate as to lose his goods, it would be hard to make him pay freight; if he has had the enjoyment of the ship during the time she was occupied with his goods, it is an enjoyment which through his loss has proved useless to him, and which would have been equally so to any other person.

64. The rule of the Ordinance takes effect whether the ship was let to hire in part or in whole: both cases are governed by the same reason. Valin cites a sentence rendered at Marseilles in July 1748, which has thus adjudged.

In like manner the rule of the Ordinance takes effect whether the contract of affreightment was for the voyage or by the month; no distinction is pointed out, but the regulation is general and applies to every species of affreightment. We may also argue from this, that wages are not due sailors in case of shipwreck, whether they were hired by the month or voyage.

65. The Ordinance says, *if there is not an agreement to the contrary;* it may therefore be lawfully agreed that freight shall be due at all events.

66. III. When the freighter has lost only a part of his goods, he is discharged from the freight of none but what is

(*g*) *Du fret*, art. 18.

lost or taken; freight is due for all that has been saved, either in the whole, if the master has since the accident had them conveyed to the place of their destination, or *pro rata itineris peracti*, if, unable to find a ship to carry them to the end of the voyage, he has left them where they were saved. Such is the direction of the Ordinance.(*h*)

67. It is the same with goods, which, after having been taken with the ship, have been ransomed. The Ordinance(*i*) says: *If the ship and goods are ransomed, the master shall be paid his freight to the place of capture, and even his whole freight, if he conduct them to the port of discharge and contribute to the ransom.*

We must suppose, for the case in which freight is due *to the place of capture*, that it is not in the master's power to carry the goods farther; for instance, that the capture was preceded by a sea-fight in which the ship was crippled and rendered unable to pursue her course; for no freight would be due, if an act of the master prevented the cargo from reaching the place of its destination.

68. In general the merchant is discharged from the payment of freight only when the goods have been taken or lost; if they are still in existence, without having been carried to the place of delivery, and this is not in consequence of the master's fault, freight is due, not indeed for the whole voyage, but for such a proportion of it as had been successfully performed.

Such likewise is the decision of the Ordinance,(*k*) where it says: *If the master is compelled to have his vessel repaired on the passage, the shipper shall either wait or pay the whole freight; and in case the vessel cannot be refitted, the master shall forthwith procure another; and if he cannot find one, he shall be paid freight only pro rata itineris peracti.*

(*h*) *Du fret*, art. 21 & 22. (*i*) *Ibid.* art. 19.
(*k*) *Ibid.* art. 11.

It is to be remarked, first, that this article relates to a ship which has been injured in a storm, by running ashore or in a fight; and as here the voyage is interrupted from no misconduct of the master, but from superior force for which the letter to hire is not responsible, freight is due in proportion to that part of the voyage which has been made: but if an act of the master caused this interruption, as when the merchant should prove that the master was incapable of navigating the ship to port after she had put to sea, then not only no freight would be due, but also the master would be liable to an action for the damages and interest of the shipper.(*l*)

Secondly, we are to understand from the words, *shall forthwith procure another*, that the master shall do so if he wishes to gain the whole freight; and not that he shall absolutely and literally; for by the coutract of affreightment, he has only contracted to furnish his own vessel; he has not promised to furnish another; and when accidents of superior force, for which he is not responsible, have rendered him unable to furnish his own, all that he is bound to do by the principles of the contract of letting to hire is to discharge the freighter or hirer from the freight for so much of the voyage as remains; in which case freight is due him only for what is performed.

Another case will be mentioned hereafter, in which freight is due for a part of the voyage.

69. When, after the departure of the ship, commercial intercourse is interdicted with the country which was destined to be the *terminus* of the voyage, and the goods, being unable to reach the place of delivery, have been brought back to the place of departure, the shipper ought not to be wholly discharged from the freight; for it is only when the goods are taken or lost that he is wholly discharged; and in this case his goods are restored to him safe and sound; he has enjoyed the use of the ship so long as his goods were on board, namely,

(*l*) *Du fret*, art. 12.

during the time that she was sailing for the place of her destination, and, after she was stopped by the prohibition of commerce, an accident of superior force against which the master did not warrant, during her return-passage. Nor is the freighter obliged to pay the whole freight, since he could not have the use of the ship, nor transport his goods in her to the place of their destination. Hence the Ordinance has taken a middle course. *If an interdiction of commercial intercourse,* it says,(*m*) *takes place with the country where the ship was going, and she is obliged to sail back with her cargo, no freight shall be due except for the voyage out, even if it was promised out and home.*

According to this article, when the vessel was freighted only for the outward voyage, the master ought to be contented with the freight agreed upon for that voyage, without having a right to ask any thing for the return, although he has brought back the goods in his ship; and if freight was agreed upon out and home, the master shall be paid only one half, that is, freight for the outward voyage.

If the interdict took place before the ship sailed, no freight at all would be due, because the merchant would not have had the use of the ship.

This article applies only to a prohibition of commercial intercourse with the place whither the ship is bound; a prohibition as to any other places is no reason why the master should not proceed to the place of his destination.

70. IV. There are some cases where all the freight is due, even if the goods have not arrived at the place of their destination.

The first case is when they have been cast overboard for the common safety. The owner of these goods, receiving an indemnity for his loss from those interested in the preservation of the ship, ought to pay freight; which is decided by the

(*m*) *Du fret*, art. 15.

Ordinance.(*n*) If it be not just that the merchant should bear alone the loss of goods thrown into the sea for the common safety; for the same reason it is not just that the letter of the ship should lose his freight.

Besides, the letter of the ship, to whom the freight is due, contributes to the compensation of the loss in the proportion of the freight (*o*)

When contribution does not take place; the ship being lost subsequently to the jettison by some other accident, it is evident that the shipper owes no freight for the goods thrown into the sea.

71. A second case mentioned by the Ordinance(*p*) much resembles the preceding. *Freight shall in like manner be due for goods which the master has found it necessary to sell for provisions, repairs and other pressing wants of the ship, their value being accounted for by him according to the price at which the rest sold in the place of discharge.*

It is right the merchant should pay freight for his goods in this case, although they did not reach the place of their destination, because he is put in the same state as if they had arrived, by being paid for them at the rate for which the rest sold.

72. When the vessel does not arrive at the place of her destination, being lost on the passage after the sale of the goods, is freight due on these goods? This question depends on one already discussed, namely, whether the owner of goods sold for the wants of the ship should be paid for them if the ship was lost in the course of the voyage. In the opinion of those, who think the owner cannot ask for the price of the goods in this case, no freight is considered due. In the contrary opinion, should it be decided that the owner of the goods sold, to whom the price is reimbursed, give credit for and deduct the freight? The Ordinance of Wisbuy,(*q*) which we have before cited, says: *if the ship is lost, the master shall pay for the goods*

(*n*) *Du fret*, art. 13. (*o*) *Ibidem.* (*p*) *Ibid.* art. 14.
(*q*) Art. 68.

without claiming any freight. Valin very judiciously remarks that the effect of this article is inequitable and its doctrine ought not to be followed. It is certainly true that a merchant, whose goods have been sold, ought not to pay the entire freight, which would have been due if they had reached the place of their destination, because the master only repays him what the goods brought, and he, being deprived of the gain which he reasonably expected to make on his goods at the market, is not in the same condition that he would have been, if his goods had actually arrived; but at least it is proper that the merchant, who is repaid all which the goods sold for, should owe a part of the freight in proportion to the advancement of the voyage at the time of the sale. Such is the opinion of Valin, which may be supported by that article of the Marine Ordinance,(r) which decides that when goods have been saved from shipwreck, and the master does not carry them to the place of their destination, freight is due for so much of the voyage as had been performed when the goods were saved: for it may be said that, if goods are sold and the price paid their owner, they are in effect saved from shipwreck.

73. The third case, in which the whole freight is due on goods which have not arrived at the place of their destination, is when the act of the freighter has prevented their arrival. This is conformable to the principles of the contract of hiring, according to which the hire is due, when it has depended altogether upon the hirer whether he should use or not use the thing hired.(s) (22)

According to this principle, the Ordinance decides(t) that *a merchant, who has neglected to lade the goods contained in the charter-party, shall pay the freight as much as if he had put them on board.* For if he has not enjoyed the use of the whole ship, it is in consequence of his own act, and it is by his own act that her cargo was not completed.

(r) *Du fret*, art. 22.
(s) Pothier, *Du con. de Louage*, n. 142. (t) *Du fret*, art. 3.

Observe, however, that, in order to render the freighter liable for freight under this article, he must be formally made delinquent as to the lading of what remains to be laden, by a demand which the master should enter against him, and sentence rendered thereon, purporting that, if the merchant neglects to finish the lading in a certain time fixed by the judge, the ship will be permitted to set sail. If the master should set sail without so doing, he would have no claim to the whole freight, but on the contrary would be responsible for the damages and interest of the merchant.

74. The Ordinance affords another example of the same principle.(*u*) *The merchant, who withdraws his goods during the voyage, shall notwithstanding pay the whole freight.*

This article subjoins, *provided he did not withdraw them on account of some act of the master*, for instance, because the bad condition of the ship made her incapable of conveying them, or because the master prolonged the voyage too much by stoppages of which he had given no previous intelligence: in these and similar cases, it is rather an act of the master which prevents the freighter from using the ship, than it is of the freighter himself; and therefore the freighter, so far from being liable to pay freight, may look to the master for damages.

75. The Ordinance brings forward another example of the principle, that the merchant must pay freight when it depends only upon himself whether he will enjoy the use of the ship. *If the ship has been stopped*, says the Ordinance,(*w*) *on her passage or at the port of discharge by means of the freighter; or if the ship, having been freighted out and in, is obliged to return empty, the cost of delay and the whole freight shall be due the master.*

76. It is to be observed with regard to the cases in these two articles, that, if the master had let others have the room, which

(*u*) *Du fret*, art. 8. (*w*) *Ibid.* art. 9.

the freighter's goods would have occupied, if he had not taken them out, or if he had laden a return cargo, the freight thus earned by the master should be deducted from that which is due from the merchant.

This is a dictate of equity, and is besides deducible from the words of the Ordinance, *is obliged to return empty;* hence it is only when the ship returns empty, that the master can demand freight of the merchant who neglects to lade a return-cargo; if the master does not return empty, and has been able to let others the room which the freighter's goods would have occupied, he can only exact from him the surplus or what remains after making a deduction of the freight received.

77. The Ordinance contains one exception to the principle, that the freighter owes the whole freight when it is by his own fault that his goods have not been transported on board the ship to the proper place. Its words are:(*x*) *If the ship is freighted as a general ship, by the quintal or the ton, a merchant, who wishes to withdraw his goods before the departure of the ship, may do so on landing them at his own expense and paying a moiety of the freight.* This is a favour which the Ordinance grants the freighter, permitting him to break his engagement and pay only one half of the freight which was wholly due according to the rigour of legal principles. This favor is founded on the supposition, that the master can easily find others to fill up the ship before her departure.

78. The moiety of the proper freight, which is paid by the merchant in this case, being the price of the risk which the master incurs of not finding any others to hire the place which the merchant's goods should have occupied, or of not finding so high a freight, the master ought to have the benefit of it even if he should find persons to hire the room left in the ship at the same or a more considerable freight; for having incurred the risk of losing the freight for this room, he ought to

(*x*) *Du fret*, art. 6.

reap the advantage of it at all events. The master, being obliged by the law to remit one half the freight strictly due, thereby acquires a right to dispose of the room left to his own profit.

79. If a merchant, who has already put his goods on board, can break his engagement before the departure of the vessel, by paying one half of the freight; by still stronger reason can he, who has not laden his goods, break his engagement, by signifying to the master that he does not mean to put his goods on board the ship, and in offering him half his freight as indemnity.

80. In order that the merchant may, by paying half the freight, be released from his obligation, it is necessary that he should unlade his goods, or if he has not laden them, declare his intention not to do it, before the departure of the vessel, so that the master may have some little time to seek other freighters to complete the cargo; but if he defers withdrawing his goods or declaring his intention not to put them on board until the last moment when the ship is ready to set sail, I think the whole freight is due, the master not having had time given him to let the ship anew; and in this sense ought to be understood the terms, *before the departure*, according to the spirit of the law.

81. Can a freighter, who has already put on board a part of his goods, on signifying his intention not to load any more, and offering a moiety of the freight for what remains to be laden, avoid paying the whole freight for this part? It seems that he can, by the rule that *idem juris esse debet in parte quod in toto*, provided nevertheless that the place, which the rest of the lading ought to have occupied, is so large that the master can find hirers for it with facility. It will undoubtedly be objected that an article of the Ordinance hereafter cited leads to a different conclusion, in saying that a merchant, who has laden in part only, must pay freight as if his lading was complete: but

it is replied, that this article ought to be confined to the case where the freighter has let the ship sail without signifying his intention not to finish the lading. Such is the opinion of Valin.

82. The favor which the Ordinance shows merchants in permitting them to withdraw their goods before the departure of the ship on paying half freight, is in the case of affreightment by the quintal or ton. The words are: *if the ship is freighted as a general ship, by the quintal or the ton.* This favor is therefore denied in the case of affreightment of an entire ship. The reason of the difference is, that it is not so easy for the master to let the whole ship promptly as it is to let a quintal or ton.(23.)

83. V. When the arrival of the ship has been retarded, if the delay proceeded from an act of the freighter, it is evident that he cannot complain, and that not only the whole freight is due, but also the cost of the demurrage: such is the decision of the Ordinance.(*y*)

And *vice versa* it is no less evident that, if an act of the master caused the vessel to stop either at the place of discharge or on the passage, he is liable for the damage and interest of the freighter at the estimation of persons capable of judging;(*z*) and when the sum has been determined it may be deducted from the freight due.

84. When the delay is in consequence of superior force, as when *the vessel is stopped by order of a sovereign power in the course of the voyage,* the Ordinance makes a distinction between affreightment for the voyage and by the month.

If the affreightment was for the voyage, that is to say, if a certain sum of money was agreed on as the freight for the whole voyage, in this case freight is due according to the contract, and ought not, under pretext of the delay, to receive increase or diminution; for this delay arising from superior

(*y*) *Dufret,* art. 9. (*z*) *Ibid.* art. 10.

force, against which nobody warranted, *casus fortuiti a nemine præstantur*, the master and the freighter can have no claims on each other on account of such an event.

85. When the affreightment is made by the month, that is to say, at the rate of so much for each month, in this case the time that the detention lasted is not taken into consideration and no freight is due for that period. The reason of which is, that when it is agreed to pay a certain sum for each month, reference is had to each month of navigation. The time the detention lasted was not a time of navigation; it was a time that had not been foreseen, and for which no promise was made.

The regulation of the Ordinance is to this effect, where it says: *If the vessel is stopped by order of a sovereign power in the course of the voyage, no freight shall be due for the time of her detention, if she was freighted by the month, nor any increase of freight, if she was hired for the voyage; but the wages and maintenance of the crew during the time of the detention shall be reputed general average.*(a)

This article is explained by another in the Ordinance, which imports,(b) that *the maintenance and wages of the crew of a ship arrested on the voyage by the orders of a sovereign shall be reputed gross average, if the vessel was hired by the month; and if she was hired for the voyage, they shall be borne by the vessel alone as simple average.*

The reason of this distinction seems to me obvious. The price of the services rendered by the crew for the guard and preservation of the freighter's goods being one of the things comprehended in the freight, when affreightment was made for the voyage, the master, who receives freight for the whole voyage including the time of the detention, ought to furnish the services of the crew during the whole voyage, including the time of the detention. And as the master owes the services

(a) *Du fret*, art. 16. (b) *Des avaries*, art. 7.

of his crew to the freighter during the time of detention as much as during the rest of the voyage, he ought to maintain and pay the crew at his own expense during this time and during the rest of the voyage. Hence the freighter ought not to be made to contribute in such a case. On the contrary, when affreightment is by the month, the master receiving no freight during the time of the vessel's detention, does not owe the freighter the services of his crew: and therefore here the freighter ought to contribute during the time for the wages and maintenance of the crew in consideration of the services they render.

86. VI. Regularly freight cannot be demanded, till the ship has reached her destination, unless there is an agreement to pay freight in advance. If the ship be wrecked on the voyage and the master elects not to carry the goods saved in another ship, he may then have a right to sue for the freight on so much of the voyage as has been performed. In like manner if the freighter withdraw his goods on the way, or before the departure of the ship, an action for the payment of freight may be had from the day they were withdrawn.

87. The letter to hire generally has the course of an action to obtain payment, though sometimes only that of exception or deduction.(24) This action is the action *ex locato* growing out of the obligation that a partial or entire freighter contracts by the contract of charter-party.

88. When the master of the ship was the letter to hire, although he contracted on account and for the benefit of his principal, the owner of the ship, and must account with him for the freight, yet the freight is properly due the master, because with him did the freighter contract and enter into obligations. Hence the action for payment resides in his person, and there is no doubt of his right to prosecute the action, or that payment made to him would be valid.

However, as the master must finally account for the freight

with the owner, in order to avoid the multiplication of suits, the law permits the owner to demand and require the freight of the shipper, on taking out an order(25) against him together with the master.

When the owner of the ship has personally let her to the freighter, an action for the payment of freight can be brought only in the name of the owner; but even in this case the payment may be made to the master, as manager of all the concerns of the ship.

89. This action is privileged, and the master or owner has a lien for the freight on the goods conveyed in the ship before all the creditors of the freighter, and even before the seller of the goods, to whom the price is due, whether the sale was for cash or on credit. Nay more, this privilege prevails against the owner of the goods who should reclaim them as having been stolen from him before the freighter put them on board the vessel; for the master, having conferred a benefit on the owner of the goods by conveying them to a place where they bear a greater price than they did in the hands of the owner, ought not to be deprived of the freight or price of the conveyance; otherwise the freighter would be enriched at the expense of the master, which common equity forbids.

90. This privilege does not last always; as we learn from the Ordinance,(c) where it is said: *The master shall be preferred for his freight on the goods so long as they remain on board the ship, in the lighters, or on the quay, and even a fortnight after their delivery.*

The Ordinance subjoins, *provided they have not passed into the hands of a third person:* for if they have been sold, although before the expiration of a fortnight, the master can no longer exercise his privilege; since it is a general principle that all the privileges which we have on moveable property

(c) *Du fret*, art. 24.

cease when the property ceases to belong to our debtor. *Moveables are not followed into the hands of a stranger.*(26)

The master may preserve his privilege by seizing the goods; and this seizure prevents the prescription of a fortnight from taking effect, and prevents the goods from being sold to his prejudice. He cannot make this seizure while the goods are on board his vessel; they must have been debarked, in order, before paying the freight, to ascertain whether any thing is wanting, whether they are in good condition, and whether they have not been injured by his fault: all which can be done only after debarkation. This we learn from the Ordinance, which declares,(*d*) that *the master shall not detain the goods in his ship on account of the freight; but he may oppose their transport at the time of the discharge, or seize them in the lighters.*

91. Care should be taken in all this not to confound the privilege on goods attached to the action *ex locato*, with the action itself, which the master has against the freighter; when he has not siezed the goods during the fortnight after delivery, he loses indeed his privilege on the goods, but he retains his action *ex locato*.

If he fail, however, to prosecute his claim for a year after the voyage is completed, prescription runs against this action(27) by the Ordinance.(*f*)

92. When the master owes the freighter a sum equal to or greater than the freight, as the price of goods, for example, which the master has sold on the passage for the use of the ship or because the goods have been damaged by the master's fault, the freight in such a case amounts to nothing more than an exception, or rather a deduction, which the master can oppose, so far as it will go, to the demand of the freighter; and he cannot be deprived of the benefit of deduction by any prescrip-

(*d*) *Du fret*, art. 23. (*f*) *Des prescrip.* art. 2.

tion of time, according to the maxim *quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.*

93. VII. The freighter is bound to lade his goods in the time agreed on by the charter-party, or assigned him by the judge; under pain, when he has been put in arrears, of being liable for the damages of the master occasioned by such delinquency.

94. In like manner, twenty four hours after the goods have been taken on board, the freighters should present bills of lading to the master for his signature, and they ought to place in his hands an acquittance of their goods and other necessary documents, under pain of being liable for the damages arising from their delay:(*g*) provided however, if the master have suffered any injury therefrom, that the delay of the freighters was the sole cause which prevented his departure.

95. Another species of obligation contracted by the freighter, as between him and the master, is when the master has undergone some extraordinary expense in the course of the voyage on account of the cargo. In this case the freighter must indemnify the master, provided it was no fault of his which gave rise to the expense. Such are the charges incurred for the preservation of a freighter's goods in time of shipwreck. Likewise the customs and imposts paid for the goods, such as entry and clearance-duties, are a charge on the freighter, who is required to reimburse the master for every such payment by him made.

96. Finally the freighter contracts the obligation of contributing to the common average in the proportion of the goods he has laden on board. This contribution will be considered in the second part of this treatise.

(*g*) *Des connois.* art. 4.

SECTION IV.

On the dissolution of the contract of charter-party.

97. Regularly the contract of charter-party, like all other contracts, is dissolved only by the consent of the parties: *quæ consensu contrahuntur, contrario consensu dissolvuntur.*

98. Nevertheless, if before the departure of the vessel, by an accident of superior force, and not in consequence of the act or fault of either of the parties, the contract cannot be put in execution, it will be legally dissolved, without any intervention of the parties to produce its dissolution. The Ordinance furnishes us with an example. *If a prohibition of commercial intercourse, war, reprisals or the like be declared against the country where the ship is bound, the charter-party will be dissolved without any liability for damages on the part of either of the contractors.*(*h*) The justice of this regulation is evident. Prohibition of commercial intercourse with the country for which the ship is bound, prevents the execution of the charter-party, and of course this event ought to dissolve the contract.

Neither of the parties can claim any damages of the other for not executing the contract, since to neither is the non-performance imputable.

The Ordinance subjoins: *and the merchant shall pay the cost of loading and unloading his goods.* This follows from what was said before, that neither party is answerable to the other in this case for damages. The master, not being liable for the damages of the freighter, is not obliged to indemnify him for the expense of lading his goods in the ship.

99. The Ordinance adds further: *but if it be with another country, the charter-party shall remain in full force.* When the prohibition does not embrace the country, for which the

(*h*) *Chartes-part.* art. 7.

ship is bound, but is confined to some other country, there is nothing to prevent the ship from going to the place intended by the charter-party, and of course nothing to prevent the execution of the contract. Navigation is rendered more perilous, because the ship may be attacked on the way by the vessels of belligerents; but the breaking out of war, and the dangers to which it exposes, being a case which is unfortunately too common, and which the parties can foresee, ought not to release them from their mutual obligations. Hence the master cannot in this case give up the voyage without rendering himself liable for the damages and interest of the freighter; and *vice versa* the freighter, who declines executing his part of the contract, incurs the penalty mentioned in its place, of paying the whole or a part of the freight according to circumstances.

The Ordinance says, that the charter-party *shall remain in full force;* neither of the parties can claim any change in the conditions of the contract; the master cannot pretend to deserve an increase of freight under pretext that the voyage has become more perilous.

100. Nothing but events, which absolutely prevent the execution of the contract, such as a prohibition of commercial intercourse, will produce its dissolution. It is otherwise as to the causes which only retard its execution: the parties must then wait until it can be performed. This we are told by the Ordinance.(*i*) *If the ports are shut or vessels arrested by superior force, the charter-party shall remain in full force, and the master and freighter shall be mutually obliged to wait until the ports are thrown open and the vessels released; but no damages will be due on either side.*

101. The Ordinance subjoins:(*k*) *The merchant may nevertheless land his goods at his own cost during the time the ports continue closed and the ship under detention, provided he relade them or indemnify the master.* This regulation is very equita-

(*i*) *Chartes-part.* art. 8. (*k*) *Ibid.* art. 9.

ble. The merchant may have an interest in landing the goods, through fear that they should be hurt, for instance, by remaining too long on the water, if the detention is of considerable duration. The master has no interest in opposing it, because the discharge is made at the merchant's expense, and the merchant is obliged to put them on board the ship again when the detention has been taken off and the master wishes to set sail.

The obligation imposed on the merchant to relade, or indemnify the master, consists in this, that the merchant, who neglects to relade, shall owe freight as if he had done it; or at least half freight, according to the distinctions before explained.

102. There is one case, in which Valin remarks that the merchant is absolutely dispensed from the obligation to relade, without being held to indemnify the master or pay freight; which is when the goods are of a kind, that cannot be preserved during the long time the detention lasts, and cannot easily be replaced with other goods of the same sort. This observation of Valin's is just. The detention in this case has not merely retarded, it has absolutely prevented, the transport of goods of this kind and the execution of the contract: which, according to our principles, ought to effect a dissolution of the charter-party without rendering either person liable for damages.

SECTION V.

Of another view in which the contract of charter-party may be considered.

103. We have hitherto considered the contract of charter-party as a contract for the hiring of a thing, by which the owner of the ship, or the master, his agent, lets the ship to a merchant for the conveyance of his goods and lets at the same time his services as master for making the conveyance:

this is *locatio navis et operarum magistri ad transvehendas merces.*

The contract of charter-party may be considered under another view, as a hiring of labor, *locatio operis*, by which the merchant hires the labor of the master to make conveyance of goods, the master engaging to do this for a stipulated price: this is *locatio operis transvehendarum mercium.*

This distinction is merely speculative; and the contract, under each of these views, produces the same obligations in the person of the master and freighter.

Considering charter-party as the hiring of a thing, the merchant contracts the obligation to pay freight and the rest of his obligations, in quality of hirer of the ship; and he is answerable *actione ex locato* to the master who is the letter to hire: on the other hand, considering it as a contract for the hiring of labor, the merchant, it is true, in like manner contracts the obligation to pay freight and the rest of his obligations; but he contracts them in quality of *locator operis transvehendarum mercium* and is liable *actione ex conducto* to the master, who is *conductor hujus operis.*

So likewise of the master: the contract, whether considered as *the hiring of a thing* or *as the hiring of labor*, imposes on him the same obligations. In the first case, as letter of the ship, he is answerable to the merchant, as hirer, *actione ex conducto:* whereas, considering the contract as the hiring of labor, he is answerable, *tanquam conductor operis*, to the merchant, who is *locator operis, actione ex locato.*

These different names of actions being of no use in our law, it is immaterial, *in praxi*, whether the charter-party be considered as the *hiring of labor*, or as the *hiring of a thing.*(28)

MARITIME CONTRACTS

OF

LETTING TO HIRE.

PART II.

ON

COMMON OR GROSS AVERAGE.

ON

COMMON OR GROSS AVERAGE.

PRELIMINARY ARTICLE.

104. We have seen, in discussing the contract of charter-party, that the merchant, who lades goods in a ship, promises the master by the contract to contribute to the common average, which may take place during the voyage; and that *vice versa* the master virtually promises the merchant-shipper, in case his property suffer any average losses for the good of all, to cause him to receive an indemnity by contribution of the owners of the ships and the other merchants.

The subject of this contribution is therefore dependant on the contract of charter-party, and ought to be considered next to this contract.(29)

105. Average, in marine language, signifies the loss and damage suffered in the course of a navigation.(30)

Such is the definition given by the Ordinance.(*a*) *Every extraordinary expense incurred for the sake of the goods and ship, conjointly or separately, and all damage which happens to them from their lading until the discharge and delivery, shall be reputed average.*

106. Average is distinguished into common, likewise called gross average, and simple average.

Common average is that suffered for the common safety: all other is simple average. This is the definition of the Ordinance.(*b*) *Extraordinary expenses for the ship alone, or for*

(*a*) *Des avaries*, art. 1. (*b*) *Ibid.* art. 2.

the goods alone, and the damage which they suffer individually, are simple and particular average: but the extraordinary expenses incurred, and damage suffered, for the common good and safety of the ship and merchandise, are gross and common average.

Common average alone admits of contribution. Simple average must be borne wholly by them, to whom the damaged goods belong, or for whom the expenses were incurred, according to the principle that things are at the risk of their owners. The Ordinance so decides, in saying,(c) that *simple average shall be borne and paid by the thing which has suffered the damage or caused the expense; gross or common average shall fall on the ship and goods together, in proportion to their value.*

107. Throwing goods into the sea to lighten the vessel in a storm, or to escape the pursuit of pirates or enemies, is one of the principal kinds of common average, as well as the damage caused other goods by the jettison. We shall speak in one section of these kinds of average and of the contribution to which they give rise; and in a second section of the rest of the most ordinary kinds of common average, which give rise to contribution, and of those which are nothing but simple average and do not occasion contribution.

SECTION I.

Of jettison, of the damage caused by jettison and of the contribution arising from these averages.

108. It is sometimes necessary to lighten a ship in the course of the voyage by throwing overboard a part of the goods with which she is laden, to preserve the vessel and the rest of the cargo. This may happen in a violent storm, in order that the vessel may become able to resist it; or when the vessel is

(c) *Des avaries*, art. 3.

chased by enemies or pirates superior in strength, that, being lightened by the jettison of many goods, she may sail faster and avoid her pursuers.

Nothing is more equitable than that, the jettison having procured the preservation of the ship and the remaining goods, the owners of the ship and of the goods saved should contribute to the reparation of the merchant's loss, whose goods were thrown into the sea for the benefit of all concerned.

The laws of the Rhodians, which are the most ancient maritime laws known, and which the Romans adopted on account of the wisdom of their regulations, recognised the justice of this principle. *Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*(*d*)

We will examine, first, in what case the jettison of goods gives rise to contribution; secondly, what damage, in case of jettison, should be repaired by contribution; thirdly, who should contribute and in the proportion of what things; fourthly, what action the owners of goods thrown into the sea, or damaged by the jettison, may resort to for the purpose of procuring indemnity by contribution; fifthly, what is to be done as to goods that, after being thrown overboard, are again recovered.

ARTICLE I.

In what case jettison gives rise to contribution.

109. Jettison gives rise to contribution only when it has procured the preservation of the ship and goods remaining. In order to produce this effect, two things must concur, namely, that there be sufficient cause for making the jettison, and that the jettison succeed in preserving the vessel from wreck or pillage.

(*d*) *Digest.* 14. 2. 1.

First, there must have been sufficient cause for making the jettison; for if a master from excess of timidity, *meticulosus rem nullam frustra timens*, should throw goods overboard on a false alarm, and when there was no need of it, it cannot be said that the jettison has procured the preservation of the ship and goods remaining, because they might have been preserved without the jettison; and in this case, therefore, the jettison ought not to give rise to contribution, the master and his employers becoming liable to an action *ex conducto* for the loss of the goods causelessly thrown into the sea, from him to whom the goods belong. Besides, this case never happens.

110. In order that the master should be considered as having had just cause for making the jettison, it must be conformable to the requisitions of the Ordinance. It is there said:(*e*) *If in a storm or when chased by pirates or enemies, the master thinks himself obliged to throw a part of his cargo into the sea, he must advise with the merchants and chief men of the ship's company.*

The *merchants*, of whom the Ordinance requires the master to take advice, are such owners of goods on board as have themselves embarked in the ship.

The *chief men of the ship's company*, are not only the officers, such as the pilots, steersmen and mates, but even the older sailors, whose experience renders them fit to give advice: for by these terms the Ordinance only means to exclude raw sailors and ship-boys. This opinion is adopted by Valin.

The Ordinance continues:(*f*) *If there be diversity of opinion, that of the master and the ship's company shall prevail.* The reason of which is, that the master and crew, being acquainted with nautical affairs by their profession, are deemed better able to judge than the merchants who may happen to be on board the ship. Valin says it should be so, even if the merchants are the greatest in number. The same author adds that,

(*e*) *Du jet*, art. 1. (*f*) *Ibid.* art. 2.

in case of a division in the ship's company the master ought to have the casting voice.(31)

111. The master ought to consult the ship's company, not only to know if it is necessary to lighten the ship and throw the goods into the sea, but likewise to know what ought to be thrown; and in this respect the Ordinance is to be followed, which says,(g) that *the utensils of the vessel and other things the least necessary, the heaviest, and of the smallest value, should be thrown overboard first; and afterwards the goods between decks:*(32) *all nevertheless at the choice of the captain and by the advice of the ship's company.* It is obvious that the choice here granted the captain is not *merum arbitrium,* but *arbitrium boni viri.*(33)

112. That the master may be in a condition to prove that he has proceeded agreeably to what the Ordinance prescribes, that he may not be liable for the value of the goods thrown overboard, and that he may have a right to call the merchants to a contribution, he must observe the following regulations of the Ordinance.(h) *The clerk or whoever fills his place must write the deliberation in his journal as soon as possible, and have it signed by those who took part in the deliberation, or state the reason why they do not sign, and make as good a memorandum as he can of the articles thrown overboard and damaged.* The words, *or whoever fills his place,* are inserted, because there is not ordinarily a writer by name on board merchant-ships.

The Ordinance proceeds: *At the first port, which the ship makes, the master must declare before the judge of admiralty, if there be one, the cause for which he made the jettison, &c. if it is in a foreign country, before the consul of the French nation.* For although the master have made a record of the jettison and of the goods thrown overboard and damaged, he is nevertheless obliged to confirm the contents of the writing prepared on board by a judicial declaration.

(g) *Du jet,* art. 3. (h) *Ibid.* art. 4 & 5.

When there is no court of admiralty at the place where the ship arrives, he must make this declaration before the ordinary judge; and it matters not whether the judge is an inferior or royal judge; the Ordinance makes no distinction.

He should do it on arriving, and in twenty four hours at the latest, which is the time prescribed in general for reports.(*i*)

The object of these regulations is to prevent frauds and among others that which the master and crew might commit by secretly landing goods and then pretending that they had been thrown overboard with the rest.

113. It is not sufficient that the jettison should have been for a good cause, with a view to prevent the shipwreck or pillage of the vessel in case of a storm or chase. It is necessary in the second place, as we have said, that it should effectually have prevented the shipwreck or pillage of the vessel. For this reason, if, during a violent storm or chase by pirates or enemies, goods are thrown into the sea in order to save the vessel, and notwithstanding the jettison the ship is lost in this storm or taken in this chase, there will be no grounds for contribution. They who have the good fortune to rescue any goods from the wreck or pillage will not be compelled to contribute for the loss of the goods thrown overboard; for as here the jettison did not prevent the shipwreck or capture of the vessel, it has not been the means of preserving the merchandise that was preserved. Such is the rule of the Ordinance.(*k*) *If the jettison do not preserve the ship, there shall be no contribution, and goods saved from the wreck shall not be held to make any payment on account of those thrown overboard or damaged.*

The sufficient reason, which the master had to make the jettison, discharges him from his obligation to produce the goods at the port of delivery; but, according to this article, the jet-

(*i*) *Ordonnance de la Marine, Des congés et rapports*, art. 4.
(*k*) *Du jet*, art. 15.

tison will not give place for contribution unless the jettison was successful in preventing the loss of the ship in the storm; because in this case it is not to the jettison that the goods saved from shipwreck owe their preservation. This is conformable to the maxim drawn from the Rhodian law: *merces non possunt videri levandæ navis causa jactæ esse, quæ periit.*(k)

It is the same when the jettison of goods during an attempt to escape pirates does not prevent the ship from being captured; there will then be no contribution, although after the capture the ship's company, by bravery or industry, succeed in delivering the ship and remaining goods; for it was not the jettison which procured their preservation.

114. But when the jettison has effectively prevented the loss or capture of the ship during the storm or chase, on account of which the jettison was made, although afterwards during the course of the same navigation some accident happen by which the ship is lost or taken, the goods which escape from this second accident shall contribute for the jettison made at the time of the first; for this jettison was the means of their preservation. Such is the rule of the Ordinance.(l) *But if the ship, being saved by the jettison and continuing her course, is lost, the goods saved from the wreck shall contribute for the jettison in proportion to their present value, deducting the cost of salvage.*

And this rule is conformable to that of the civil law.(m) *Si navis, quæ in tempestate jactu mercium unius mercatoris levata est, in alio loco submersa est, et aliquorum mercatorum merces per urinatores extractæ sunt data mercede, rationem haberi debere ejus, cujus merces in navigatione levandæ navis causa jactæ sunt, ab his, qui postea suas per urinatores servaverunt, Sabinus æque respondit.*

(k) *Digest. l.* 4, *s.* 1, *ad leg. Rhod.* (l) *Du jet*, art. 16.
(m) *Digest.* 4, 1, *ad leg. Rhod.*

It is therefere important to know whether the ship was lost in the same storm, for which the jettison was made, or in another storm. If after the jettison there was an interruption, and afterwards the storm recommenced with greater violence and destroyed the ship, this would be the same storm, and there would be no ground for contribution.(*n*) (34)

ARTICLE II.

What injury in case of jettison should be repaired by contribution.

115. Every loss or damage, which is caused by a jettison made for the common safety, ought to be repaired by contribution.

Not only ought the loss of goods thrown overboard to be repaired, but likewise the damage of those injured by the jettison. *Quid enim interest jactatas res meas amiserim an nudatas deteriores habere cœperim? Nam sicut ei qui perdiderit subvenitur, ita et ei subveniri oportet qui deteriores propter jactum res habere cœperit.*(*o*)

In like manner if the jettison should cause any damage to the ship, it ought to be repaired by contribution. For which reason the Ordinance,(*p*) after having said, that *no contribution shall be made on account of injury done the ship*, adds, *unless it was made expressly to facilitate the jettison.* It is even sufficient, as Valin well observes,(*q*) if the damage is occasioned by the jettison, although not made for that *express* purpose. For example, if in throwing overboard the cannon or other things of great weight the sides of the ship are damaged, there is no doubt that this damage makes a part of what is to be repaired by contribution.

(*n*) Valin, *Commentaire*, ii. 207.
(*o*) *Digest.* 4, 2, *in fin. ad leg. Rhod.* (*p*) *Du jet*, art. 14.
(*q*) *Commentaire, Ibidem.*

116. Although certain articles might not have been subject to contribution for a jettison of other things, yet when these articles themselves are thrown overboard they give rise to contribution. For instance, although provisions and military stores do not contribute for the loss occasioned by jettison; yet if any of these things be thrown into the sea for the common safety, the loss ought to be repaired by contribution.(r)

117. The principle, that all damage caused by a jettison made for the common safety ought to be repaired by contribution, is liable to some exceptions.

The first is contained in the Ordinance, where it is said:(s) *goods, of which there is no bill of lading, shall not be paid for if thrown into the sea.* The reason is that the want of a bill of lading, by which the master charges himself with the goods, raises a presumption that they were shipped without his knowledge; the master in this case, not having taken charge of them, is not responsible on their account; and he himself not being held for the loss of these goods as to which he has contracted no obligation, he is not permitted to demand the reparation of this loss at the hands of the other persons interested in the preservation of the ship. Valin very judiciously observes of this rule, that it ought not to take effect, except when the master has not, by any other instrument, taken charge of the goods for which there is no bill of lading; for if he had taken charge of them on his ship-book, this would supply the place of a bill of lading, and would give him a right to call on all those liable to contribute for a loss caused by jettison. (35)

118. Another exception to the principle is contained in the following article of the Ordinance.(t) *No contribution can be demanded for goods on deck which have been thrown overboard or damaged, saving to the owners their remedy against the master.* The reason is, that these goods are found on deck either because the ship had already a complete cargo, and there was

(r) *Du jet*, art. 11. (s) *Ibid. art.* 12. (t) *Ibid. art.* 13.

no room for them when received, or because the master had neglected to stow them in a proper manner; and in both cases he is to blame. It is his fault to receive goods which overload the ship; the jettison of these goods, which it became necessary to make, being the consequences of this fault, he alone ought to bear the loss. In like manner if there was room enough in the hold of the ship, it is the master's fault that they are left on deck instead of being stowed away; and of course the jettison of these goods, which is presumed to have been made because they obstructed the working of the ship, is a loss arising from the fault of the master, which he alone must bear.(36)

ARTICLE III.

Who ought to contribute and in the proportion of what things.

119. I. The owners of the ship saved by the jettison contribute to the loss it has caused. *Dominum etiam navis pro portione obligatum esse.*(*w*)

They contribute for the ship which the jettison has preserved and for the freight which is due them on the goods on board; for the jettison has preserved the freight also, which would not have been due if the ship had been wrecked and the goods lost. Nevertheless, as freight is due them only on account of their ship, and as it designed to replace what the ship loses in value during the voyage and what expenses she has caused; it has been considered a double burden to require the owners to contribute for the whole value of the ship and likewise for freight. Hence the ancient maritime laws only required them to contribute for one, either ship or freight. The judgment of Oleron give them the choice.(*x*) The Ordinance of Wisbuy

(*w*) *Digest.* 2, 2, *ad leg. Rhod.* (*x*) Art. 8.

gave the choice to the merchants.(y) The Marine Ordinance(z) has taken another course; it has required them to contribute for ship and freight at the same time; but it makes them contribute only for half the value of the ship and half that of the freight.

When the owners have goods on board on their own account, there is no doubt that, besides the contribution they owe for freight, they must also contribute for the whole value of the merchandise.

120. But they do not contribute for the provisions and ammunition which remain in the ship.(a) This is conformable to the civil law, which excepts from contribution provisions which each one may have on board for consumption during the voyage. *Si qua consumendi causa impositæ forent, quo in numero essent cibaria; eo magis quod siquando eadefecerint in navigatione, quod quisque haberet in commune conferret.*(b)

121. II. The owners of goods remaining in the ship ought also to contribute in order to repair the loss occasioned by a jettison, which procured the preservation of these goods. They contribute in the ratio of their value, regard being had to the state in which they are found at the time of the contribution, and a deduction being made for the freight which is due on the goods.

Observe, first, that although the merchant, who has withdrawn goods during the voyage, owes the whole freight, as if they had always remained on board; still if the accident which causes jettison does not happen till after the goods are withdrawn, their owner is not obliged to contribute; for it cannot be said that the jettison has saved his goods, since they were not in the ship. The reason of the difference in this case between the debt of freight and of contribution to average, is evident. The ground on which the whole freight is due is the

(y) Art. 40. (z) *Du jet*, art. 7. (a) *Ibid.* art. 11.
(b) *Digest, l. 2, s. 2, ad leg. Rhod.*

obligation, which the merchant has contracted by the contract of charter-party, by which he has engaged to pay it; an obligation, from which he cannot release himself by withdrawing his merchandise. But the debt for contribution to average has no other ground than the safety, which the average procured, of the goods of the persons liable to contribute; and it is apparent that this obligation cannot exist with regard to those who have no goods on board at the time of the average.

122. Observe, secondly, that the owners of goods saved by means of the jettison, as well as the owners of the ship, are not the less held to contribute, because they themselves have suffered some damage in their property by the jettison for the good of all: but they contribute only after a deduction of what is due them by contribution for their loss: *deducto hoc, quod damnum passus est, reliquum conferre debet.*(c)

123. III. The owners of goods thrown into the sea for the common safety, who are to be reimbursed the price of such goods by contribution, must likewise enter into this contribution, and deduct from the sum which they are to receive a part of the loss which they are to bear; having regard to the loss of the goods which has been repaid them, and deducting the freight due. If it were otherwise, the condition of merchants, whose goods were thrown overboard, would be better than that of them whose goods were preserved; which ought not to be; justice demands that all concerned should be served alike by means of the contribution.

124. I ought, it is true, to contribute to the reimbursement which is due either to myself, or to others whose property was in like manner thrown overboard or damaged at the time of the jettison of my merchandise; but if afterwards some other accident happen which causes injury to the goods which had been saved by the jettison of mine, I am under no obligation to contribute to their owner's indemnity. This is the rule of the

(c) *Digest. l. 4, s. 2.*

Ordinance.(*d*) *Goods thrown overboard shall in no case contribute to the payment of damage accrued after the jettison to goods saved, nor the goods to pay the value of the ship when lost or beat in pieces.*

We must suppose, in the application of this rule, that after the jettison has saved the ship and the remaining goods, the ship, in the progress of her voyage, has been wrecked or stranded by some other accident: in such a case the Ordinance decides that, although the wreck of the ship and the goods saved from the wreck ought to contribute for the loss of goods thrown into the sea during the first misfortune, on the contrary, the goods thrown into the sea ought not in any case, whether they have remained in the water or whether they have been rescued from the sea, to contribute to the loss or damage caused the ship or goods by the shipwreck or stranding.

This rule is drawn from the civil law;(*e*) and the reason of the distinction is, that the jettison at the time of the first accident is a loss caused for the common safety, and which has effectually procured for the time being the preservation of the ship and of the goods remaining on board; and of course it is a common average which ought to be borne in common: on the contrary, the loss and damage suffered on the second accident by the wreck or stranding of the ship, not being a loss suffered for the common safety, is only a simple average to be borne by the owners of the goods lost or damaged.

125. IV. Passengers ought also to contribute for their clothes and jewels, even if these things do not charge the ship. *An etiam vestimentorum cujusque et annulorum æstimationem fieri oporteat? Et omnium visum est.*(*f*) The reason is that they were preserved through the jettison.(37)

It is evident that they do not contribute for their own persons; and the law gives as a reason that *corporum liberorum æstimationem nullam fieri posse.*(*g*)

(*d*) *Du jet*, art. 17. (*e*) *Dig. l.* 4, *s.* 1, *ad leg. Rhod.*
(*f*) *Dig. l.* 2, *s.* 2. *ibid.* (*g*) *Ibidem.*

Nor do they contribute for the provisions they have on board.

126. With regard to the sailors, they are dispensed from contribution for their wages and clothes,(*h*) although the preservation of these was secured them by the jettison, since wages are due only in case of safe arrival. The reason of which is, that their extraordinary personal services at the time of the accident, which caused the jettison, have conferred in them this prerogative.

It is otherwise in case of ransom, as we shall see hereafter.

ARTICLE IV.

What action the owners of goods thrown into the sea or damaged by jettison may resort to, to procure an indemnity by contribution, and the manner of making this contribution.

127. We have seen above that one of the obligations contracted by the master, as between him and the freighters, was to have them indemnified by contribution, when, for the common safety, their goods had been thrown into the sea or damaged by the jettison; and that the freighters, on their side, engage to contribute to this average, as well as to all other common averages.

From this obligation of the master is derived the action *ex locato*, which the owners of goods thrown overboard or damaged may bring against him in order that he should give them an indemnity by calling on the owners of the goods saved to make contribution: and the master may require them to make this contribution by the action *ex conducto*, which arises from the obligation to contribute which they have contracted.

This results from the Digest.(*i*) *Si laborante nave jactus*

(*h*) *Du jet*, art. 11.

(*i*) *Digest. l.* 2, *ad leg. Rhod.* The contract is here considered under the point of view described in the fifth section of the first part, as the hiring of work, *locatio operis transvehendarum mercium.*

factus est, amissarum mercium domini, si merces vehendas locaverant, ex locato cum magistro navis agere debent; is deinde cum reliquis, quorum merces salvæ sunt, ex conducto, ut detrimentum pro portione communicetur, agere potest.

128. To obtain the contribution two accounts must be drawn up, one of the amount of the loss undergone for the common safety, another of the amount of goods saved subject to contribution.

To draw up the amount of loss, we must estimate the value of the goods thrown into the sea and the damage done to those which were only damaged. This estimate should be made according to the current price at the place of discharge;(*k*) that is to say, the price for which goods of the same quality with those thrown overboard are accustomed to sell in the place where the ship unloads and at the time of the contribution. The ship's place of discharge is either that of her destination, when she safely arrives, or that where she is obliged to touch and unload, when a subsequent misfortune renders her unable to complete the voyage.

129. The goods thrown overboard being estimated according to the price which those of like quality are worth, it is necessary to know this quality before making an estimate. It is ordinarily shown by the bill of lading and invoice of the merchandise. *To judge of the quality of goods thrown overboard, the bill of lading shall be produced, and the invoice, if any there be.*(*l*) If the merchant, who owns them, pretend that the value is disguised in the bill of lading, and that the value is greater, he is not suffered to bring evidence of the fact; no person being allowed to take advantage of his own fraud; and the goods shall be valued and paid for on the ground of the quality stated in the bill of lading.(*m*) On the other hand, however, if those liable to contribute allege and prove the

(*k*) *Du jet*, art. 6.

(*l*) *Ordonnance, Du jet*, art. 8. (*m*) *Ibid.* art. 9.

goods inferior in quality to what the bill of lading imports, the goods should be valued only according to their actual quality and worth, and not on the representation of the bill of lading(*n*)

130. It remains for us to remark, as to the manner of making out an account of the losses, that in this respect the Ordinance departs from the laws of Rome. The civil law(*o*) contents itself with requiring repayment of the first cost of the goods, although their value might have been increased by their reaching the place of their destination. *Nec ad rem pertinebit,* is there said, *si hæ quæ amissæ sunt pluris veniri poterant, quoniam detrimenti non lucri fit præstatio.* The Ordinance, on the contrary, which requires the goods to be valued at the price they would bring at the port of discharge, indemnifies the owners for the gain they would have made, if their goods had arrived. This regulation seems to me more just than that of the civil law; because the condition of those merchants, whose goods are thrown overboard, ought to be made the same with that of the merchants whose goods were preserved by the jettison; and the latter having the gain which was to be made on the goods at the place of discharge, of course the former ought to have an indemnity for the profit which they would have gained if their goods had likewise arrived.

131. After having made a calculation of the loss, a second account should be drawn up containing the amount of all the property subject to contribution: what that property is we have already declared. The goods saved by the jettison, which enter into this account, ought, like those thrown overboard, to be valued at the price which goods of the same quality are worth at the place of discharge. If the bill of lading represents the goods as of a quality inferior to their genuine quality, the owners would not be heard if they desire the bill of lading to

(*n*) *Ordonnance, Du jet,* art. 10.
(*o*) *Digest. l. 2, s. 4, ad leg. Rhod.*

be strictly followed; because the goods are to be valued according to their true quality, which the appraisers have ascertained by their examination in preparing to make up an account. And on the other hand, if the goods had been declared by the bill of lading of a superior quality, the owner would not be permitted to prove them of an inferior quality to that before represented by himself; for no person is ever admitted to allege his own fraud. Hence the goods ought to be valued according to the representation.

132. Goods saved by means of a jettison, which by some new accident are afterwards deteriorated, do not contribute and are not estimated in this account more than their actual situation will justify.

But it is not the same with those damaged by the jettison; they ought to be made use of in this account for as much as they would have been worth undamaged; for if their owners are indemnified for their damage by the jettison, the goods are worth as much to them as those not damaged at all; and in this degree therefore ought they to contribute.

133. The two accounts having been drawn up in the manner we have explained, the sum of the first account, which is the loss and damage, ought to be distributed among all the property contained in the second account, at a mark for each pound of their value.(*p*) (38)

For example, the amount of losses is composed of

1. Goods of Peter thrown overboard for the common safety, deducting freight, duties and expenses -	15,000
2. Goods of Paul damaged by the jettison to the amount of - - - - -	5,000
Total of losses and damage - - -	20,000

The amount of property subject to contribution is composed of

(*p*) *Ordonnance, Du jet*, art. 7.

1. Half the present value of the ship and freight -	60,000
2. Goods on board belonging to the owner of the ship	20,000
3. Goods of James in their actual condition deducting freight - - - - - -	30,000
4. Goods of Nicholas do. do. - -	50,000
5. Goods of Peter thrown overboard for which he is to be made good do. do. - -	15,000
6. Clothes and packages of goods of a passenger do.	5,000
7. Goods of Paul worth at present 15,000, but when his damage is repaired, and freight deducted	20,000
Total of contributory values - - -	200,000

The sum of this account being ten times as great as the sum total of losses, each person will have to contribute ten per cent. on the value of his interest in the contributory articles.

The owners therefore lose - - - - -	8,000
James - - - - - - -	3,000
Nicholas - - - - - - -	5,000
The passenger - - - - - -	500
Peter contributes to be deducted from what he receives	1,500
Paul the same - - - - - -	2,000
Total of contributions - - -	20,000

Of this sum Peter will take 13,500 livres, which is the amount of his loss diminished by his share of the contribution; and Paul will take 3,000 livres, which is also the amount of his loss with the same diminution.

134. The contribution being thus regulated, the Ordinance declares, that *if any person liable to contribution refuse to pay his share, the master may retain and even sell his goods to the amount due, under authority of court, in order to secure or satisfy the contribution.*(q) This article is to be interpreted in connexion with another heretofore cited, which says,(r) that *the master cannot retain goods on board as security for the*

(q) *Du jet*, art. 21. (r) *Du fret*, art. 23.

freight, but that he can only have them seized in the lighters at the time of discharge. If according to this article the master cannot retain goods in the ship in default of the payment of freight; for the same reason he cannot, when the merchant has failed to pay his contribution for average, refuse to deliver the goods from on board his ship. Contribution for average ought to have no privilege over the freight; and therefore what is said in the Ordinance as to retaining goods as security for the contribution, ought to be understood in this sense, namely, not that he can retain them on board and refuse to deliver them, but that, after they are delivered, he may seize them in the lighters, on the quay, or in the store-houses.

Valin observes that, although, according to this article, the master may make seizure of the goods and when it is made the owner cannot replevy them without giving security, nevertheless it is not usual to make such seizures, unless the solvency of the merchant is doubted; and that of course a master, who has not made this seizure, and who has let the merchants remove and dispose of their goods, is not liable, in case either of them proves insolvent, except when those interested in the division of the loss had seized the goods in his hands.

ARTICLE V.

On the case in which goods thrown into the sea are recovered.

135. The owner of goods thrown into the sea for the preservation of the ship, whatever consent he may give in this respect, is not considered as relinquishing his property in that merchandise; *quoniam*, says Javolenus, *non potest videri id pro derelicto habitum, quod salutis causa interim dimissum est.*(s) Hence if goods thrown overboard are afterwards drawn up, whether by divers or by fishers, there is no doubt that the own-

(s) *Digest. l.* 21, *s.* 2, *de acquir. possess.*

er may reclaim and recover them on paying the cost incurred in their recovery.(39)

136. When the owner of goods thrown into the sea recovers them, if contribution is not already made, it is evident that in making it, he can be charged in the estimate of losses, not for the whole price of the goods, but only for the sum they are depreciated in value, and for the cost of their recovery.

If they are recovered afterwards, the Ordinance provides for the case.(t) *If goods thrown into the sea are recovered after the distribution of losses, the owner shall return to the master, and others interested, what he has received from the contribution, deducting the damage they have suffered, and the expenses of their recovery.*

Observe that the owner, whose loss has been made good to the whole value of the goods thrown overboard, having contributed himself, and deducted from his nominal receipts a part of this value, ought also to have a share of the sum restored the contributors. For instance, if Peter has been made good by the contribution, in the sum of 15,000 livres, for which he is charged in the estimate of losses, and which was the whole price of his goods; and if his goods are still worth 10,000 livres when deduction is made for their damage and for the expense of getting them out of the water; then he will be obliged to restore 10,000 livres to the amount contributed. Suppose this amount to be 200,000 livres; the 10,000 livres will be a twentieth part of it; and each of those interested in the contribution ought to take five per cent. from this sum of 10,000 livres, that is, a twentieth part of the sum for which he was charged in the amount of the contribution. Peter being there charged 15,000 livres, and having contributed in the proportion of this sum by the deduction from his receipts, ought to retain 750 livres in the 10,000, and the surplus of 9,250 livres should be distributed in the same proportion among all those charged in the average contribution.

(t) *Du jet*, art. 22.

SECTION II.

Of other kinds of common average which give rise to contribution.

137. The Ordinance enumerates those common averages, which most ordinarily happen.(*u*)

The first kind is of *things given to pirates by composition for the ransom of the ship and merchandise.* It is evident that the loss of things given pirates by composition to induce them to let the ship proceed, being a loss suffered to prevent the ship and all her goods from falling into the hands of pirates, is a common average, for which they, to whom the goods belong and who have lost them for the common safety, ought to receive an indemnity by contribution made in the same manner as in the case of jettison.

Although the privateers of enemies, which in time of war have a commission to cruise, are not strictly speaking *pirates*, still what is here said of things given by composition to pirates ought to be understood of things given by composition to privateersmen; there is a parity of reason.

138. The Ordinance says *given by composition;* in order that what has been given a pirate or privateer should be considered as given for the common safety and as a common average to be suffered in common by contribution, it must have been given by composition; that is to say, the things must have been offered the cruiser to induce him to let the ship proceed, and that cruiser, having accepted the proposal and received the things offered, must in fact have permitted the ship to pursue her course. But if the cruiser had made himself master of the ship, and without any composition had selected the most precious effects and those which suited him best, and had then let the ship proceed with the residue; the

(*u*) *Des avaries*, art. 6.

loss of goods thus taken possession of, would have been only a simple average to be wholly supported by the owners of the goods; for the cruiser having taken possession of the goods by force, because they suited him best, it cannot be said that they were given him for the common safety, nor that this is a loss incurred with a view to save the ship and the residue of the merchandise. This we learn from the civil law. *Si navis a piratis redempta sit, Servius, Ofilius, Labeo, omnes conferre debere, aiunt; quod vero prædones abstulerint eum perdere cujus fuerit.*(v)

In like manner what any one has promised to give, not for the common safety, but for the ransom of his private goods; if he was afterwards obliged to give it, for instance in order to deliver persons whom he had left with the cruiser as hostages; then it would be merely simple average without any contribution. Hence the law subjoins: *nec conferendum ei qui merces suas redemerit.*(40)

139. Although what is given a cruiser should be given by composition for the ransom of the ship, and to procure her release; still if contrary to the faith of the composition, he take possession of the ship and pillage her, there will be no contribution; and the owners of the goods given ineffectually by way of composition, can demand nothing from those who save their goods from the pillage; as in case of a jettison, which has not prevented the ship from perishing in the storm, for which it was made, there is no contribution made by those who preserve their goods from the shipwreck: for in order that a loss made with a view to the common safety should give rise to contribution, it must for the time being have procured the preservation of the vessel.

But if the cruiser, executing the composition, let the ship proceed, and afterwards another accident happens by which the ship again falls into the hands of enemies, there will never-

(v) *Digest. l. 2, s. 3, de leg. Rhod.*

theless be a contribution; and those who save their goods from pillage in the second accident will contribute for the loss of goods given away in the first towards a composition, which for the time being saved the ship and the goods on board: in the same manner as was laid down in pursuance of the laws respecting jettison.

140. The Ordinance in another place(*w*) regulates the contribution occasioned by ransom. *Contribution on account of ransom*, it says, *shall be made on the current price of the goods at the place of discharge, deducting expenses*; that is to say, the expenses of unloading and of the freight due on the merchandise: for the merchant would not have made profit on his goods but with this deduction. The Ordinance proceeds: *and on the total amount of goods and freight, deducting provisions consumed and advances made to the seamen.* Here is the first difference between this contribution, and the contribution made on account of jettison and other common averages; in which the owner of the ship contributes only for the half of the value of the ship and half of the freight, as we have seen before: whereas in case of ransom he contributes for the whole ship and freight. For the rest, in the account of contributing values, freight is charged with a deduction of provisions consumed and of advances made the seamen; because the freight affords the owners a profit only under this deduction.

141. The Ordinance adds: *who*, that is the seamen, *will also contribute at the discharge of the freight in proportion to what remains due them of their wages.* This is the second difference between this contribution and those made in case of other averages. It is repeated afterwards in the title concerning the hiring of seamen, where it is said:(*x*) *the wages of seamen contribute to no average, except for the ransom of the ship.* The reason of the difference is the great advantage it procures seamen, whose freedom it preserves.

(*w*) *Du fret*, art. 20. (*x*) *Du loyer des matelots*, art. 20.

Observe that it is said, *shall contribute at the discharge of the freight.* It is not therefore that the owner of the ship is to make any profit by this contribution of the seamen; the merchants are not to gain; they are sufficiently benefited by the contribution of the owner of the ship, in discharge of the ransom, for the sum total of the ship and freight. Of course the wages of the seamen ought not to be comprehended in the account of contributory values, in regulating the contribution between the owner of the ship and the merchants; but after this contribution is regulated, the share of the contribution, paid by the owner of the ship, ought to be divided and borne in common between the owner of the ship in proportion to the freight, and by the seamen in proportion to what is due them for wages. For instance, suppose the owner of the ship, on account of his freight valued, after deductions, at the sum of 24,000 livres, should be charged a sum of 7,000 livres in the contribution, and that 4,000 livres remain due the seamen: then the sum of 7,000 livres, which the owner has been charged for freight, ought to be proportionally divided between the said owner and the seamen: and the sum of 24,000 livres, amount of freight, being six times that of 4,000 livres, amount of wages due; the owner ought to bear six sevenths, and the seamen one seventh, amounting to the sum of 1,000 livres, which the master of the ship will deduct from the 4,000 livres due them for wages.(41)

142. The second kind of common average, enumerated by the Ordinance, is of *goods thrown into the sea;* which we have discussed in the preceding section.

The third species is, of *cables or masts broken or cut, anchors and other effects abandoned for the common safety.* In order that this damage be considered as made for the common safety, it is requisite, as in case of jettison, that it should have been done by the advice of the merchants in the ship, and of the principal persons of the crew,(y) in a violent storm or when

(y) *Ordonnance, Du jet,* art. 1 & 2.

chased by pirates or enemies, and that it should for the time have procured the preservation of the ship.

When this damage has not been made designedly to procure the preservation of the ship, but has happened in consequence of a gust of wind, it is only simple average, which does not give rise to contribution, and which ought to be suffered wholly by the owners of the ship :(42) as decided by the Ordinance, which declares,(*z*) that *the loss of cables, anchors, sails, masts or rigging, caused by storm or other marine accident,* is only simple average. This being simple average, the owners of the goods are not obliged to contribute any thing for the expense of refitting the ship, so that she may finish her voyage and convey the goods to the place of their destination.(*a*) In the same manner I should not be liable if a locksmith should break his hammer, or anvil, in laboring at the work which I have given him to perform.(*b*)

143. The fourth kind is the damage done the goods, remaining on board the ship, in making the jettison : of which we have spoken in the preceding section.

The fifth kind, is *the dressing and nourishment of a sailor wounded in defending the ship.* This extends to the case of a combat maintained to prevent the capture of the ship by cruisers; the seaman having exposed his person for the common safety, the expense of his nourishment, and of the dressings required by his wounds, ought to be borne in common, and reputed common average. It matters not whether he was wounded fighting with arms in his hands, or in working the ship, during a combat: in both cases he labored for the common safety.

What is said of a sailor, seems to me to extend to all the persons in the crew, and even the master : if in fighting or working the ship during a fight, or in giving orders, they

(*z*) *Des avaries*, art. 4.
(*a*) *Digest. l.* 6, *ad leg. Rhod.* (*b*) *Ibid. l.* 2, *s.* 1.

have been wounded, as it would have been done for the common safety, the charge of nourishment and dressing is a common average.

I think likewise the same may be said of passengers, who may have taken up arms in a fight, at the requisition of the master: if they are wounded, the expense of their nourishment, and dressing ought also to become a common average.

If it was not in fight, but in performing the ordinary service of the ship, that a seaman was wounded, it is not a common average. This distinction is established by the Ordinance.(c) *The seaman, who shall be wounded in the service of the ship, or who shall fall sick during the voyage, shall be paid his wages, and dressed solely at the charge of the ship; and if he is wounded in fighting enemies or pirates, he shall be taken care of at the charge of ship and cargo.*

For the same reason that the cost of nourishing and dressing a seaman wounded in fight is a gross average, to be supported in common; so that which is to be paid the heirs of a person killed in battle in addition to what would have been paid them if he had died in sickness, and which consists in the wages of the seamen from his death to the end of the voyage,(d) ought to be reputed gross and common average; as Valin remarks, and as is hereafter explained at length. I have nevertheless heard a distinction made in this respect between the case when the master has hired other seamen to replace those killed, and the case in which they have not been replaced. When the master has hired other seamen to replace those who were killed, the payment, which he must make the heirs of the deceased, of the wages accrued since the death of the seamen to the end of the voyage, is for him, inasmuch as he is equally obliged to pay the wages of the new seamen, a double expense and an extraordinary expense, which, being caused by the death of seamen killed for the common safety, constitutes a

(c) *Des loyers des matelots*, art. 11. (d) *Ibid.* art. 15.

common average; and here therefore the merchants ought to contribute. But when a sailor killed in battle is not replaced, the payment of wages, which the master makes the heirs of the sailor, does not seem to be an extraordinary expense, nor consequently a common average; for the master pays no more in case of the sailor's death, than he would have done if he had continued alive; since he must then have paid the sailor himself the same sum which he now pays his heirs. This distinction seems to me quite plausible.

144. The nourishment and care of sailors wounded in a fight sustained for the defence of the ship being common average, it ought also to be decided that the damage, suffered by the ship in this fight, should in like manner be deemed common average, to which the goods on board the ship ought to contribute. This damage is very different from that which is caused by a storm, and which is only simple average, because it is not suffered for the common safety. The fight, on the contrary, being sustained for the defence of the goods as well as ship, the damage, which the vessel receives, is suffered for the common safety, and of course is common average.

145. The sixth kind is *the expense of unloading in order to enter a harbour or river, or to get the vessel afloat.* This applies, as Valin observes, only to the case of a storm or chase, or other accident. If to prevent shipwreck, or capture, it is necessary to enter a harbour, which is not the place of destination, and which cannot be entered without unloading a part of the cargo, which for the time is deposited in boats or lighters; these are extraordinary expenses made for the common safety, and for the preservation of the ship and goods, and of course they are common average, to be supported in common by contribution. It is the same with the expenses incurred *to get the ship afloat,* that is, in sailing out of the place where she had taken refuge, and being put into a condition to pursue the voyage with her cargo. But the expenses of unloading incurred at

the place of destination, when the harbor there is such that the ship cannot enter without unloading, are ordinary expenses to be supported by those to whom the goods belong. Such are the sentiments of Valin.

146. The seventh kind of common average, described by the Ordinance, is when the ship is unable to enter safely a port or river, with her whole cargo, and a part of it is unloaded into boats, denominated lighters. It is comprized in these two articles, of the title on jettison. *In case of the loss of goods put in barks to lighten the vessel when she is entering a port or river, contribution shall be made by the ship, and her entire cargo. But if the vessel is lost with the residue of her cargo, no contribution shall be exacted on the goods placed in lighters, although they should arrive in safety.*(e) The reason of the distinction is, that, the discharge of the goods into lighters having been made for the preservation of the ship, and the remaining goods, in order that the ship might enter the harbor with greater facility, the loss of these goods in the lighters, where they were deposited, has been suffered for the preservation of the ship and remaining goods, and of course ought to be suffered in common: but when the ship herself is lost, and the lighters arrive in safety, it cannot be said that the loss of the ship has been suffered for the preservation of the lighters.

The rules in these two articles are drawn from the civil law.(f) *Navis onustæ levandæ causa, quæ intrare flumen vel portum non poterat cum onere, si quædam merces in scapham trajectæ sunt, eaque scapha submersa est, ratio haberi debet inter eos qui in nave merces salvas habent, cum his qui in scapha perdiderunt, tanquam si jactura facta est: contra, si scapha cum parte mercium salva est, navis periit; ratio haberi non debet eorum qui in nave perdiderunt; quia jactus in tributum salva nave venit.*(g)

(e) Art. 19 & 20. (f) *Dig. l.* 4, *ad leg. Rhod.*

(g) *Id est, is demum jactus, ea demum jactura venit in tributum, quæ ad salvandam navem facta est, et per quam navis salva facta est.*

The rule does not take effect, except when the discharge of the goods is made with a view to lightening the ship, and facilitating her entrance into port, whether that port is the place of destination or not; but if the merchant unloads only that the goods may sooner arrive on shore, while the vessel remains in the roads, the discharge not being made for the preservation of the ship, and goods remaining on board, the loss of the goods should not be reputed common average, but should be borne entirely by those to whom the goods belong.

A distinction has been made with regard to the same regulation. When it is to enter a port where an accident has compelled the ship to stop, that she is lightened, this regulation always takes effect; because there could have been in this case no fault of the master, who could not foresee, when loading, that he should be forced to enter this port. But when it is to enter the ship in the port of her destination, that she is lightened, the master who knew or ought to have known the capacity of the port, whither he was bound, is to blame for taking in so full a cargo; it is therefore by the master's fault that it has become necessary to remove the goods into lighters, and that the goods so removed have been exposed to the risks they run on board these barks, and which they would not have run on board the ship; and of course the master alone ought to be responsible in case of accident, and a loss could not be reputed common average.

147. The Ordinance contains an eighth kind. It says,(*h*) that *the loadmanage,*(43) *towage and pilotage for entering or sailing out of harbors or rivers, are petty average, which shall be paid one third by the ship, and two thirds by the merchandise.*

Loadmanage is the pay of loadsmen, that is, persons who sail before ships in barks with instruments for towing the ship, and directing her course, in order that she may escape the dangers in her way.(*i*)

(*h*) *Des avaries*, art. 8. (*i*) *Guidon de la Mer*, ch. 14.

Towage is that which is given for towing ships into rivers.(*k*)

Pilotage is what the master gives pilots of the place, which the vessel is approaching or leaving, to conduct the ship in and out, and enable her to avoid the dangerous spots of which these pilots of the place have knowledge.

This kind of common average has two things peculiar to it: the first is that, although common average is usually named gross average, this, because of its smallness, is called petty average: the second is, that, whereas in common average an estimate is made of the ship to determine the part she ought to pay, for the contribution to this average, on the contrary, no estimate is made of the value of the ship, but one third is taxed on the ship, and two thirds on the merchandise. The reason is that the expense is too inconsiderable to require an appraisement of the ship.(44)

148. Observe that the expense of loadmanage, towage and pilotage, are not properly average, unless made on occasion of some storm or chase, by entering a port other than the place of destination, or departing from it; for it is only then that these charges are an extraordinary expense. Now according to the definition which we have given, and which is authorized by the Ordinance, averages are an extraordinary expense.

Although these charges of loadmanage, towage and pilotage, when incurred entering the place of destination, are an ordinary expense, and so not properly an average, nor a thing for which underwriters are liable, still even in this case they are borne in common, one third by the ship, and two thirds by the goods, and are assimilated to common average.

This interpretation of the Ordinance is given by Valin, and conforms to the relation, this article has with the succeeding, which says :(*l*) *The duties of discharge, inspection, report, tuns, beacons and anchorage, shall not be reputed common aver-*

(*k*) *Guidon de la Mer*, ch. 16. (*l*) *Des avaries*, art. 9.

age, but shall be paid by the master. It is certain that this article ought to be understood only of the case in which the payment of these duties is an ordinary expense, that is to say, when they are paid at the place of the ship's departure and destination; for when these duties are paid, on entering or leaving a port, where a storm or chase obliged the vessel to stop, the payment of these duties, being an extraordinary expense, is an average, and a common average, since it is incurred for the common safety. This article applying then to the case of ordinary expenses, and being put in opposition to the preceding, it follows that the preceding ought to be understood of the case in which the loadmanage, towage and pilotage, are an ordinary expense.

149. The duties of *discharge,* of which the Ordinance speaks, are those which the master pays the admiralty at the place of his departure, to obtain a discharge or passport for the voyage.

Those of *inspection* are what is given the officers of the admiralty for inspecting the ship.

Those of *report* are what is due for the declaration which the master must make to the admiralty, at the place of his arrival, or where he stops.

Tuns are empty casks placed above rocks and sand-banks, where they serve as a signal to shun the danger.

Beacons are a general expression, comprehending every thing which serves to indicate the route at sea; and therefore tun and beacon-duties seem to be small duties, required of ships entering ports for the maintenance of buoys and beacons.

Anchorage-duties are duties paid the admiralty, for permission to anchor the ship.

150. There are some others, beside these different kinds of common average, mentioned by the Ordinance, which we have described. For instance, when a ship is pursued, and the

master to avoid capture runs the ship ashore, the damage caused the ship or goods by the stranding is a common average, because it was incurred for the common safety.

151. Valin very properly considers as a common average the expenses of a ship, which has taken refuge in a port, or under a citadel, to escape from the vessels of enemies, and which remains there until the enemy has retired; for this is an extraordinary expense incurred for the common safety, and of course it is a common average; it was for the common safety that the master took refuge in the place, and there remained.(45)

This case is different from that of arrest by princes; for it cannot be said that expenses caused by an arrest of a prince, for the support and wages of seamen, has been made for the common safety; this arrest is compulsory, arising from superior force, against which the merchants did not engage to secure the master, nor the master the merchants. Therefore, when the ship is hired for the voyage, this expense should be borne by the ship as simple average.(*m*) When the ship is hired by the month, this expense is reputed gross average, for a particular reason which we have already noticed; namely, that the master, not receiving in this case any freight from the merchant during the time that the arrest continues, he is not obliged to furnish the services of his sailors for the guard, and preservation of the goods without some recompense.(46)

152. After having explained what is common average, it is easy to know what is simple average; since it is every loss not suffered for the common safety. Hence it is that the Ordinance says:(*n*) *The damage happening to goods through their inherent defects, by storm, capture, shipwreck or stranding, the expense of saving them, the duties, imposts and customs, are simple average borne by the owners.*

(*m*) *Des avaries*, art. 7. (*n*) *Ibid.* art. 5.

153. Even if the damage should have been caused by the fault of the master, or his people, it is still simple average, and does not give rise to contribution; but the owners of the goods, in this case, may be indemnified by bringing an action against the master and owners of the ship, his principals. To this effect is the Ordinance.(o) *The damage done to goods by the fault of the master, or of the crew, in not well closing the hatches, mooring the ship, or furnishing her with good cordage, or otherwise, is simple average, which falls on the master, ship and freight.* It shall fall on the master because the merchant has an action *ex conducto* against him for indemnity, as we have seen in discussing the contract of affreightment. The article adds, *ship and freight,* because the merchant has against the owners of the ship the action *exercitoria,* for which they can abandon the ship and freight; and if this be not sufficient to indemnify the merchant, he may satisfy himself out of the property of the master.

154. In like manner all the damage suffered by the ship, when it is not for the common safety, is a simple average to be borne wholly by the owners of the ship, saving to them a remedy against the master, when it was caused by the fault of him or his people. Hence the Ordinance says:(p) *No contribution shall be made on account of damage done the ship, unless it was done to facilitate the jettison.* And we may add, *or in any other manner for the common safety,* as would be damage sustained in the defense of the ship.

155. There is another kind of average, concerning which the Ordinance contains a peculiar regulation.(q) It is the average or damage suffered by a ship in the shock or falling foul of another, when no fault of the master or crew caused them to strike.

According to the principles of the civil law,(r) when a ship

(o) *Des avaries,* art. 4.
(p) *Du jet,* art. 14.
(q) *Des avaries,* art. 10.
(r) *Dig. l.* 29, *s.* 2 & 4, *ad l. Aquil.*

strikes or boards another without any fault of the master or crew, this boarding is regared as an accident *qui a nemine præstatur*, and the owner of the damaged ship has no action for reparation. But as it may sometimes happen that the fault of the master or of his people occasions the damage, when the fact cannot be proved, the Ordinance, in this uncertainty, unwilling to make the ship bear the loss, as if a fault had been proved, and equally unwilling to discharge the ship from the whole loss as if the master's innocence was indubitable, has thought proper to divide the difference, and make the damage to be borne equally by the ship damaged, and the ship which caused the damage. This it has done by saying: *In case a ship runs against another, the damage shall be paid for equally by the vessels, whether at sea, in a road, or in port.*

Regulations of this nature, by which the difference is divided into halves, and which the gloss denominates *judicium rusticorum*, are not unknown to the civil law: the Institutes furnish us with an example.(*s*) (47)

The rule under consideration is founded on a reason of public interest, in order to make masters of vessels more careful in taking every precaution to avoid such a misfortune.

156. The Ordinance has it, *shall be paid for equally:* meaning by the term *equally*, that the ship which caused, and the ship which suffered, the damage, should bear it by moieties, as expressly declared by the Judgments of Oleron.(*t*) The damage, therefore, is not borne in proportion to the value of either ship: if in striking they caused mutual damage, each is to bear half the damage done to both ships.

157. The words are, *by the vessels*, that is to say, by their owners. If the master of the ship, which caused the damage, or his crew, cannot be proved in fault, the master is not liable, unless he should happen to be himself owner of the ship.

(*s*) *De vulg. subst. s. fin.* (*t*) Art. 14.

It is not unusual in the civil law, that owners should in some cases be responsible for the damage caused by their property.(*u*)

The goods on board the ship, which caused the damage, are not obliged to contribute; for the Ordinance says, *by the vessels;* and this damage, not being suffered for the common safety, is not a common average, to which the cargo ought to contribute.

158. When a ship, in accidentally running against another, not only damages that ship, but also the goods on board, the owners of the goods have no action by which to procure indemnity; for the Ordinance speaks only of damage done the ship; and as the regulation is contrary to the regular principles of the law, it admits of no extension. *Quod contra rationem juris introductum est non debet trahi ad consequentias.*(48)

159. These remarks apply to the case where nobody is proved in fault: *but if the ships strike by the fault of either of the masters, he who caused the damage must make reparation.*(*v*) If the master, by his fault or that of his people, caused the damage, he must repair it as to both ship and cargo. Valin adduces several instances, in which the fault of the master is the cause of the damage. It is his fault if the ship, not being well fastened, broke away, and run against another ship. So likewise, it is his fault, if, when his ship is at anchor, he has not put out a buoy, that is, a piece of wood floating over the spot where the anchor lies; and for want of this precaution, he is responsible for the damage ships may suffer by running foul of his anchor.

(*u*) *Digest. l. 7, s. 1, damn. infer.* (*v*) *Des avaries*, art. 11.

MARITIME CONTRACTS

OF

LETTING TO HIRE.

PART III.

ON

THE HIRING OF SEAMEN.

ON THE

HIRING OF SEAMEN.

PRELIMINARY ARTICLE.

160. The Marine Ordinance enumerates four different methods of engaging mariners,(*w*) namely, for the voyage, by the month, on profits, and for a part of the freight.

The engagement of mariners *for the voyage* is a true contract of letting to hire, by which a sailor lets the master of a ship his services for a voyage, in consideration of a single determinate sum, which the master, on his side, promises to pay him as wages for the whole voyage.

Engagement *by the month* is also a genuine contract of letting to hire, by which a sailor lets the master of a ship his services for a voyage, in consideration of a sum which the master is to pay him for each month that the voyage continues.

These two contracts differ in this, that in the first, the hire consists in a single sum for the services of the whole voyage, whether less or greater in duration; whereas in the second, the hire consists in so much money as the voyage is months in duration.

161. Engagement *on profits, or on shares*, is a contract by which a sailor promises to serve the master of a ship, during a certain period, or a certain voyage, for a certain part of the expected profits. This is a bargain sometimes made by sailors with masters of cruising ships going a cruise in time of war, or masters of fishing vessels.

(*w*) *Des loyers des matelots*, art. 1.

Engagement *for a part of the freight* is a contract by which a sailor promises to serve the master of a ship in a certain voyage, for a certain part, which the master promises to pay him, of the freight to be received by the ship, from the merchant-freighters.

The two last kinds of engagements are contracts of partnership.

162. It is principally of the two first kinds of engagement, that is to say, the hiring of seamen for the voyage, and for the month, that we now propose to treat. In one section we shall consider the persons between whom the contract is made, its form and the obligations contracted by the sailor; and in another, the obligations of the master towards the sailor.

We may remark, before entering upon the subject, that the regulations, cited by us from the title concerning the hire of sailors in the Marine Ordinance, equally apply to the rest of a ship's crew; for the last article(x) in this title provides, that *every thing ordered by the present title touching the hire, dressing, and ransom of sailors shall apply to the officers and others of the ship's company.* This even extends to the respective obligations of the master to the owners of the ship, and of the owners to the master.

SECTION I.

Of the persons between whom the contract is made, of its form, and of the obligations of the sailor.

ARTICLE I.

Of the persons between whom the contract is made.

163. The master of a ship being the person to whom the owners have entrusted her command and management, he

(x) *Du loyer des matelots*, art. 21.

ought to have power, as we have remarked in the first part, to make all contracts concerning the command and management of the ship. Therefore he is above all authorized to contract with sailors and other mariners, in order to take them into his service, and compose of them his crew; for it is just that he should have the choice of those men, who are to cooperate with him for the conduct of the ship, and for whose faults, or constructive faults, he is responsible. Hence the Ordinance says :(*y*) *It shall belong to the master to make up the ship's company, to choose and hire the pilots, mate, sailors and companions.*

The name of *pilot* is given him, to whom is entrusted the steering of the ship.(*z*)

The *mate* is charged with the execution of the master's orders, and commands in case of the master's illness.(*a*)

Companions is a general term, comprehending all persons who compose the crew.

When the owners of the ship are not on the spot, the master, being unable to consult them, has an absolute authority, as to the choice of the persons taken into the ship's service, and on the terms of the bargain made with them, and his acts bind the owners of the ship, his principals, who, although not consulted, cannot censure the bargain nor complain of it, provided it has been made on ordinary and reasonable conditions.

164. It is not the same when the owners are on the spot; wherefore the Ordinance subjoins :(*b*) *which he shall do in concert with the owners, when he is in the place of their residence.* The master ought in this case to consult them, both with regard to the persons whom he means to take into the ship's service, since he ought not to take any that are disagreeable to them, and with regard to the price of wages. If the master fails to consult the owners, the contract is nevertheless valid, as between

(*y*) *Des capitaines*, art. 5. (*z*) *Ordonnance, Du pilote.*
(*a*) *Ordonnance, Du contre-maitre.* (*b*) *Du capitaine*, art. 5.

him and those with whom he contracted, and he cannot refuse them the stipulated price; but the owners may find fault with the price, and require the master to deduct from it, if it is too dear.

165. All persons, who follow the profession of sailors, ought to be classed, that is, enrolled in the classes of sailors in some one of the departments of the marine. These sailors all owe the king's ships their services one year in every three; and during the other two years, they may let themselves to masters of merchant vessels. Merchants cannot take any others in their service, except strangers, English, Dutch or Italian, or natives of any other country, provided that the number of these foreign seamen do not exceed a third of the whole ship's company.(c)

ARTICLE II.

Of the form of this contract.

166. The Ordinance requires these contracts to be reduced to writing. It says:(d) *The agreements of masters with their crew shall be reduced to writing, and shall specify all the conditions, whether engagements were made for the voyage or the month, on profits or freight; otherwise the sailors will be believed on their oath.* This form exacted by the Ordinance regards only the proof of the contract, and not its substance; in fact the contract by which a sailor lets his services to the captain of a ship, although not reduced to writing, does not cease to be valid in itself, or to bind the parties *in foro conscientiæ*, and even in a court of justice, when the parties disagree. This article regards then nothing but the proof of the contract, excluding evidence by testimony, and requiring the sailor to be believed on his oath.

(c) Valin, *Nouveau Commentaire*, &c.
(d) *Du loyer des matelots*, art. 1.

167. The things, concerning which there may be dispute between the master and sailor, are either the quality of the contract, or some condition of it that is extraordinary and unusual in the contract, or the price of wages.

When the dispute is on the quality of the contract, Valin well observes that the regulation of the Ordinance, which defers the decisory oath to the sailor, ought not to take effect, unless the quality of the contract alleged by the master is contrary to the usage; as if in a place where it is customary to hire sailors for the voyage, the master should pretend that the contract was for each month, or for a part of the freight, the sailor, who pretends that he was hired for the voyage, should be believed on oath.

On the contrary, if the sailor should pretend to have been hired by the month, the master, who should say that the contract was made for the voyage according to the usage of the place, ought to be believed: the presumption being in favor of the usage, according to the rule, *si non apparet quod actum est, erit consequens ut id sequamur, quod in regione, in qua actum est, frequentatur.*(e) The sailor, who is dissatisfied, can only require the master to make answer on oath.

168. When the dispute is concerning some condition, which the master pretends was added to the bargain, and this condition is not a part of the nature of the contract; as in this case it is for the master to prove his allegations, according to the rule *ei incumbit onus probandi qui dicit,* if he has failed to write down the bargain, and have the proof at hand, the sailor ought to be believed on oath.

But if it be a condition which the sailor pretends was added for his advantage, and which is not in the nature of the contract, as it is for him to prove his assertion, he must refer himself to the master's oath, if the master is dissatisfied.

(e) *Digest. l.* 34, *de reg. juris.*

169. When the parties agree on the kind of bargain, and the dispute is on the price of wages, for which it was made, it should seem that the oath ought to be deferred to the master *tanquam digniori;* nevertheless we have seen that the Ordinance defers it to the sailors: and this is a punishment of the master for neglecting to observe the regulation, in not writing down the terms of the bargain.

ARTICLE III.

Of the obligations of seamen.

170. When a sailor has let his services to the master of a ship for a certain voyage, the services, which he is obliged to render, commence from before the ship's departure. *The sailors,* says the Ordinance,(*f*) *shall be held to render themselves at the day and place assigned, to put the provisions on board, get the ship ready and make sail.*

Although this article speaks only of *provisions,* nevertheless Valin seems to suppose that the present usage is to regard the lading of the cargo as comprised in the services owed by the sailors. This takes place, according to him, not only as to the goods of the owners of the ship, but even as to the goods of merchants, who are not obliged to carry their goods any farther than the quay, where the ship is fastened, or to the side of the ship when she lies in the roads, from where they ought to be taken on board by the sailors. With regard to the care of stowing the goods, this does not belong to the sailors, but to persons called stowers.

This custom, of obliging sailors to lade the ship's cargo, is not universal. I learn, that in most of the ports of Normandy the usage is otherwise; that the engagement of sailors does not oblige them to do any thing more than be ready to embark when the ship is getting under sail; that the article of the

(*f*) *Des matelots,* art. 1.

Ordinance above cited is not observed; and that the sailors do not go to work on board before the departure of the vessel, unless they choose, and then for wages, that make no part of their engagement. The usage being different in different places, the sailors are deemed to have agreed to those conditions, which are usual in the place where they contracted their engagement, according to the rule, *in contractibus veniunt ea, quæ sunt moris et consuetudinis in regione in qua contrahitur.*

171. Sailors, who have let themselves for the voyage, do not finish their engagement, until the ship arrives at the place of her destination and discharge. Such is the regulation of the Ordinance.(*g*) *Sailors engaged for a voyage cannot quit, without a written discharge, until the voyage is finished, and the ship is fastened at the quay and entirely unloaded.* If, which often happens, the sailor had let his services for the outward and homeward voyage, he cannot leave the ship until she has returned to the place from whence she set sail, and is there unloaded.

172. All that we have said applies not only to the case in which the sailor is hired for the voyage, but also to that in which he is hired by the month for a certain voyage: for here he cannot quit the service at the end of each month, nor until the ship has arrived at the place of her destination, nor, according to the usage of some ports, until the ship has been discharged. The single difference between the two species of hiring, as we have already observed, is that when the service is performed by the month, the hire consists in so much money every month the voyage lasts; whereas when the service is for the voyage, the hire consists in a specific sum agreed upon whatever may be the length of the voyage.

173. Although it is a principle with regard to obligations which consist in doing a thing, that he, who is obliged, cannot

(*g*) *Des matelots*, art. 2.

be constrained to do the precise act promised, according to the rule *nemo cogi potest ad factum;* and although the non-performance of the contract only gives rise to damages, as we have seen in the treatise on obligations;(*h*) nevertheless, by an exception to this principle, sailors who have let their services for the ship can be compelled to render them with exactness.

This appears from the Ordinance.(*i*) *If the sailor quits the ship before the voyage commences without a written discharge, he may be taken and arrested wherever he can be found, and compelled by bodily restraint to restore what he has received, and to serve, so long as he had engaged, without compensation; and if he deserts after the voyage is begun he shall suffer corporal punishment.*

The penalty of deprivation of wages, here inflicted on a sailor who deserts, was formerly to the profit of the owner, who remained discharged of so much money; but at present these wages are confiscated for the benefit of the king.(*k*)

The corporal punishment, pronounced by the same article against sailors, who have quitted the service of the ship after the voyage commenced, is to be understood of the punishment of whipping, according to the ordinance of March 1584.(*l*)

The king's declaration of the twenty second of September 1699, pronounced the punishment of three years in the gallies, against all those officers, mariners and sailors, who abandon at sea the ship for whose service they were hired. I learn that this law, for the punishment of the gallies, is not rigorously observed with regard to sailors who desert from merchant-ships; but more severity is shown against those who desert from the king's service, and there are may instances of the infliction of this punishment on them conformably to the same declaration.

(*h*) *Des Obligations*, n. 152. (*i*) *Des matelots*, art. 3.
(*k*) See the orders of council reported by Valin. (*l*) Art. 67.

174. It is evident that the sailor is not subject to punishment, when, by means of an accident of superior force, such as sickness, he is prevented from fulfilling his obligation, and from sailing with the ship on the service for which he was hired: the master cannot in this case claim any thing more than a discharge from payment of wages, and a return of what has been advanced.

Suppose a sailor was unable to sail, because he had been detained prisoner by virtue of a warrant of arrest for a crime of which he was accused, or suppose he was arrested in the course of the voyage in virtue of this warrant: in this case if by the event of the process he was not declared convicted, the imprisonment would in like manner be reputed an accident of superior force, and there would be no ground for damages; but if he was convicted of the crime, he would not, it is true, be subject to the punishment described above, because his desertion was not voluntary; but as it was through his own act and fault that he was made prisoner, and had neglected to fulfil his obligation, he would be responsible in damages, for instance, to the amount which the master was obliged to give another to supply his place: all which is conformable to the principles established in my treatise on the contract of letting to hire.(*m*)

175. According to the ancient maritime laws the sailor or pilot, who let himself for the service of a ship, was released from the performance of his engagement on restoring the wages which he had been advanced; namely, when he bought a ship after his engagement, when he was made master, and when he married.(*n*) Valin well observes, that among us marriage contracted by the pilot or sailor does not release him from any obligation. With regard to the other two excuses, he thinks them admissible; but it seems to me that it ought to be on the

(*m*) *Traité du Contrat de Louage*, n. 172.

(*n*) *Ordinance of Wisbuy*, art. 63.

condition of his furnishing another pilot or sailor in his place, and of paying the difference, if any greater wages were required by the substitute.

176. It has been inquired whether a sailor or mariner, who was hired by the master of a ship, was obliged to serve under another master, whom the owners had appointed instead of the first? The reason for doubting is, that possibly the consideration of the personal character of the master may have entered into the contract made by the sailor; nevertheless Valin decides after Kuricke,(49) that the sailor is obliged to serve under the master appointed in the place of him with whom the contract was made; because when sailors let themselves to a master for the service of the ship which he commands, it is not so much to the person of the master that they become obliged, as to the ship, that is to say, to the owner of the ship, who on his part becomes indebted to them for their wages. Besides, the interest of commerce and navigation seems to require such a rule.

What if another ship should be substituted in the place of that for whose service the sailor was hired? Valin decides that the sailor is not in this case released from his obligation, but that he must serve although in another ship; and he cites a statute of Marseilles: which appears to me just, especially if the substitution is occasioned by something that has accidentally happened to the ship.

177. If the voyage, for which the sailor has let his services, is changed, as he merely let them for a certain voyage, I do not think he can be compelled to sail on another; since the voyage, for which he has let his services, is the principal object of the contract; and to require of him to make another voyage is in fact to require of him to do what he has not promised. An argument in favor of this may be drawn from the Ordinance, which decides,(o) that *if, after the arrival of*

(o) *Des matelots*, art. 4.

the ship at the place of her destination, the master or patron, instead of returning, as the sailor was hired to do, freights or loads the ship to sail elsewhere, the sailor may leave the ship, if he see fit, unless it was otherwise agreed in making the engagement.

SECTION II.

Of the obligations of the master towards the sailor.

178. The chief obligation contracted by the master of the ship, as regards the sailor, is to pay him the stipulated wages. And there is no doubt that the master owes the sailor all his wages, when this last has performed those services for the whole voyage, which the contract obliges him to perform. We have already noticed, however, an exception with respect to sailors who desert.

On the contrary, when the sailor through his own fault neglects to fulfil his obligation, there is no doubt that the master owes him no wages for services not rendered.

When it has not been through the fault of the sailor that he has neglected to render them, is the master discharged from the payment of wages in whole or in part? We must distinguish two cases relative to this; one where it was through an accident of superior force, that the sailor failed to render his services according to his engagement; and another in which it was through an act of the master, or of the owner of the ship, who is represented by the master; and of these cases we shall treat in separate articles. In a third we shall consider when and how the wages ought to be paid the sailors; in a fourth what other obligations the master and owner owe the sailors; and lastly, in a fifth we shall speak of the actions, which the sailors, and other persons of the crew may have against the master and owners of the ship, and of the privilege and prescription of these actions.

ARTICLE I.

Of the case in which it was through an accident of superior force, that the sailor failed to render his services according to his engagement.

179. According to the general principles of the contract of letting to hire, the hirer is entirely discharged from the hire when through some accident of superior force the letter has been unable to give him the use of the thing hired; and when there is some part of the stipulated time in which the letter has been unable to give the hirer the use of the thing hired, the hirer is discharged from the payment of hire for the thing in proportion to the time during which he has been deprived of its enjoyment.(*p*)

In consequence of these general principles, in the hiring of services, when he who let his services has been prevented from rendering them by superior force, he, to whom they were let, is entirely discharged from the payment of hire if no services were rendered, or from a proportional part for the time they were not rendered.(*q*) These principles are applicable to the hiring of seamen, as to all contracts of letting to hire; but they undergo some exceptions peculiar to this species of the contract; and we shall remark them in considering the different cases of superior force, by which a sailor may be prevented from performing his service at all, or prevented for a part of the time during which he was hired.

These different cases are a prohibition of commercial intercourse with the place where the voyage in question is to end, an arrest by princes, shipwreck, stranding, or capture of the ship, and the sickness or death of the mariner.

180. I. The rule of the Ordinance in case of the prohibition

(*p*) *Traité de Louage*, part. iii, ch. i, art. 2, s. 1.
(*q*) *Ibid.* n. 165 & 166.

of commercial intercourse is conformable to the principles of the contract of letting to hire just reported. It says :(r) *In case of a prohibition of trade with the place whither the ship is bound, before the voyage begins, no wages shall be due the seamen, whether hired for the voyage or by the month.* This prohibition of intercourse being an accident of superior force which breaks up the voyage, the sailor, who has been unable to render his services, cannot claim any wages. The Ordinance adds: *they shall only be paid for the time they were employed in fitting out the ship.* Even if this labor proves of no use by the ship's being disarmed, it ought to be paid for, if it was done by the master's order. The Ordinance adds farther: *if it happens during the voyage, they shall be paid in proportion to the time which they have served.* This rule is conformable to the general principles of the contract of letting to hire.(s)

181. II. If an arrest of princes does not break up, but only retard the voyage, it is nevertheless ordered by the Marine Ordinance that,(t) *if the ship be stopped by a sovereign order before the voyage is commenced, nothing shall be due the sailors but wages for fitting out the ship.* In this respect the contract of hiring seamen is different from that of charter-party, of which a simple arrest of princes does not affect the dissolution.

182. The same article adds: *but if it be during the course of the voyage, those seamen engaged for the month shall be entitled to half-wages during the time of detention, and those engaged for the voyage shall be paid according to the terms of their engagement.*

When a seaman is hired during the voyage for a certain sum, this sum is due for the voyage, whether the duration of the voyage is greater or less; and although the time which the detention lasted may have prolonged the voyage, he can claim

(r) *Engagement*, art. 4. (s) *Traité de Louage*, n. 140 & 166.
(t) *De l'engagement*, art. 5.

no more than is promised by the bargain, namely, the single sum due him for his service on the whole voyage, whatever should be its duration. The arrest of princes, which has prolonged the voyage, and of course the time of the seaman's service, being a superior force, the master is not guarantee against it, in pursuance of the rule *casus fortuiti a nemine præstantur.* Of course the sailor cannot claim an indemnity resulting from the prolongation of his time of service by the detention; for if this delay has injured him, so likewise has it injured the master and owners of the ship.

When the seaman is hired by the month, the service of the ship during the time of the detention being much less than on the voyage, it is not just that he should be paid so much for a month of detention as for a month of the voyage; otherwise he would profit from the misfortune of the master, who receives no freight for the time of the detention, but is subjected to great charge and expense. The disposition of the Ordinance, which reduces the wages one half during the detention, is therefore very equitable.

The decision of the fifth article, that a seaman hired for the voyage cannot claim any more than the hire fixed by the contract, although an arrest of princes should have prolonged its duration, may seem, contrary to the sixth article, which says that, *in case the voyage is prolonged, the wages of seamen hired by the voyage shall be proportionably augmented.* It is easy to reconcile these two regulations. The first is in the case of a prolongation, which does not fall upon the voyage itself, since the vessel has not gone beyond the place which was to have been its termination, but falls on the length of the ship's passage: and here the sailor cannot claim any augmentation of wages, since he has only made the voyage for which his services were engaged, whatever should be its duration. On the contrary, the second is when the prolongation falls on the voyage itself, the vessel having passed the place which was to have

been its termination; now the voyage beyond this place is not included in the bargain; and the mariner ought therefore to receive an increase of wages for his service during this prolongation.

183. What we have said on the first and second cases concerns only seamen hired by the voyage or month: *as for sailors and others of the crew going on profit or freight, they can claim neither day's wages, nor indemnity, in case the voyage is broken up, retarded or prolonged by superior force, whether before or since the departure of the ship.*(u) The reason of which is, that engagements of this kind comprising a contract of partnership, those engaged in this manner ought, according to the contract of partnership, to participate in bad as well as good fortune, and lose the services which they have brought into the common stock, when the ship produces no freight nor profit, of which expectations had been raised by the master.

The *day's wages*, of which this article speaks, are for the days employed in equipping the vessel. It is otherwise with those spoken of in the ninth article; and we shall hereafter see the grounds of the distinction.

184. III. The Ordinance says(w) that, *in case the ship is taken or wrecked with a total loss of ship and goods, the seamen shall claim no wages.* This article contains an exception to the general principles of the contract of letting to hire, which we have cited above, according to which the master ought only to be discharged from a part of the hire in proportion to that part of the voyage which remains; and the seamen ought to be paid for the part of the voyage elapsed at the time of the misfortune, since they have served the ship all this time. If the Ordinance has directed that sailors be paid only on the ship and freight, and that they claim nothing when by means of an accident of superior force the owner has entirely lost his ship, and by the destruction of the goods has also lost his freight,

(u) *Des loyers des matelots*, art. 7. (w) *Ibid.* art. 8.

it is for reasons of expediency, to the end that the fortune of the sailors may depend on that of the ship and merchandise, and thus the motive of their personal interest might prompt them, in case of accident, to make greater efforts for the preservation of the ship and merchandise.(50)

The Ordinance adds: *but nevertheless shall not be held to restore what they have received in advance.* If the accident happen shortly after the voyage has commenced, so that the receipts in advance exceed the wages become due, shall they be required to restore this excess? Valin decides in the negative; because this article discharges them indirectly from the restitution of their advance-wages: if at the time of the accident the price of their services amounted to more than had been paid in advance, they would have lost this excess; and therefore now, when their advance amounts to more than their services, they deserve to profit from this excess by a compensation conformable to natural equity.

185. The next article(*v*) purports that, *if any part of the ship be saved, sailors, engaged by the voyage or month, shall be paid the wages that have fallen due, out of the wreck preserved.*(51) The Ordinance says, *engaged by the voyage or month;* for it is evident that those engaged in any other manner cannot demand payment on the wreck of the vessel; since those engaged for a part of the freight cannot, according to their agreement, claim any thing for their pay except their part of the freight expected; and when by the loss of the goods there is no freight, there can be no wages to demand; and in like manner they who have let their services for a share of the profits can claim no pay when there have been no profits.

186. This article adds: *and if goods alone are saved, the sailors, even those engaged on freight, shall be paid their wages by the master in proportion to the freight received.* When goods are saved, freight is due the owner of the ship, as we

(*v*) Art. 9.

have before seen, in proportion to the part of the voyage which had been performed at the time of the accident. The seamen, as well those hired for the voyage as those hired by the month, may satisfy themselves for their wages out of the freight, and they may entirely consume the freight for the payment of those wages. With regard to those hired *on freight*, they can claim no more than the part which they ought to have according to the terms of their agreement.(52)

187. Finally this article says: *and in whatever manner they were hired*, whether by the voyage or the month, on freight or on profits, *they shall moreover be paid for the days' work employed in saving the wreck and goods.* By the accident of superior force, which prevents the continuation of the voyage, both parties are released for the future from their engagements, and the sailors no longer owe their services: they should therefore be paid for the days' work they afterwards performed, whether in saving the wreck of the ship or in saving the merchandise. In one respect these days differ from those spent in fitting out the ship, for which sailors engaged on freight or profits can demand no pay, as we have before declared. The reason of the distinction is, that they owe this work to the company, since it is a part of what they brought into the common stock: whereas in the circumstances of the ninth article, the shipwreck having put an end to the partnership, the labor performed in saving the wreck of the ship and the goods, is furnished after the dissolution of the partnership, and of course the seamen ought then to receive some compensation.

The sailors, employed in saving the property, have a privilege before all others on the property saved.

188. IV. The death and sickness of a sailor are accidents of superior force, which prevent his affording the master his services. Hence if the sailor die before the departure of the vessel, or if at the time of the departure he be detained by

sickness, which prevents his sailing, the master, conformably to the principles of the contract of letting to hire, is entirely discharged from his wages, because he has not enjoyed his services; and he merely owes to him or to his heirs the price of his labor, if he has performed any, in fitting out the ship.

189. When after the ship has sailed, and in the course of the voyage, the seaman falls sick in the service of the ship; although, according to the general principles of the contract of letting to hire above cited, all hirers are discharged from the payment of wages during the time in which superior force has prevented the letter from giving the hirer the enjoyment of the thing hired, and although, by a consequence of these principles, a master is discharged from the payment of wages to his servant during the time, which he has been prevented from rendering his services by a disease of considerable duration;(*x*) nevertheless, in exception to these principles the Ordinance confers pay on seamen during the time of their sickness when, being in the ship's service, they fall sick during the voyage.(*y*) *If a mariner be wounded in the service of the ship, or fall sick during the voyage, he shall be paid his wages and taken care of at the charge of the ship.*

In other hirings of service, although masters have a right to deduct from a servant's wages the time he has been sick, nevertheless generous masters are not in the habit of using this right, and of making this deduction; but the Ordinance has made that, which for masters in other contracts of hiring is only an act of generosity, to be an obligation in this particular of the hiring of sailors. The design of the rule is to give encouragement to sailors, and induce a greater number of persons to embrace the profession. Besides, in contracts of this species, seamen running the risk of not being paid even for the service they have rendered, in case of total loss of vessel and

(*x*) *Traité de Louage*, n. 168.
(*y*) *Des loyers des matelots*, art. 11.

cargo by shipwreck or other accident, it was just that, as a compensation for this risk, they should be paid even for those which they have not rendered, when sickness, an accident of superior force, has prevented their rendering the stipulated services.

The sailor who falls ill or is wounded in the service of the ship gains all his wages, not only when he remains in the ship, but even when, having been landed in a port where the ship touched, he is left behind because too sick to be reembarked when the ship sails.

Observe, that in this case the master, who leaves on shore a sick or wounded seaman, must provide for the charges of his sickness, and furnish him with the means of returning home after his recovery; and for this purpose he must either deposit a sum of money or give security to be responsible, according to the regulation of the first of August 1743.

190. The Ordinance says: *if a mariner be wounded in the service of the ship.* It is therefore necessary that he should have been wounded in the service in order to be entitled to wages during the time that the wound prevented his doing service; if it is not in the service of the ship, but in a fit of intoxication, or in a quarrel with another sailor, he ought not to enjoy this advantage. He should especially be excluded in the case described by the Ordinance, where it says :(*z*) *But if he be wounded having gone on shore without leave, he shall not be dressed at the charge of ship or goods; and he may be dismissed without being entitled to wages except for the time he has already served.* It is enough that he was to blame for going on shore without permission, which is expressly forbidden sailors ;(*a*) the wound received on shore is for this alone considered to have happened by his fault, without any necessity for examining how or in what circumstances.

The words of the Ordinance, *or fall sick*, are to be under-

(*z*) *Des loyers des matelots*, art. 12. (*a*) *Des matelots*, art. 5.

stood of disorders which happen naturally; if a debauch caused the sickness of the sailor, he would not be worthy to enjoy the benefit granted by this article, according to the remark of Valin.

191. The article adds: *and if he be wounded in fighting against enemies or pirates, he shall be taken care of at the charge of the ship and cargo:* for, as we have seen, this is a common average. It is to be noticed, however, that merchants are not liable for this contribution except when the fight, in which the sailor is wounded, procures the preservation of the merchandise; they are released if the ship is taken. This is conformable to the principles of general average, which we have explained in the preceding part.

192. Let us proceed to the case in which the seaman dies during the voyage. We must here distinguish between the different manners in which seamen are engaged. When the contract is by the month, the Ordinance says:(*b*) *The heirs of a sailor engaged by the month, who dies on the voyage, shall be paid his wages to the day of his decease;* and of course all the wages fallen due during the time of his sickness. The regulation of this article is an exact consequence from the eleventh article.

When the contract is by the voyage, the heirs are much more favorably treated. The Ordinance says:(*c*) *Half the wages of a sailor engaged for the voyage shall be due, if he die in going, and the whole if he die returning.* This article supposes the sailor to have been hired for the outward and homeward voyage for a certian sum agreed on as wages both for going and returning: half of this sum, adjudged the heirs of a seaman who has died in going, will make the whole of his wages for the outward voyage. When the sailor is only hired for the passage, and he dies on the passage, the whole of his wages is due his heirs according to the spirit of this article.

(*b*) *Des loyer des matelots*, art. 13. (*c*) *Ibid.* art. 14.

Valin reports a sentence pronounced at Marseilles in 1753, which so adjudged.

What is the reason of the difference between the regulation of this fourteenth article and of the thirteenth, which, when the voyage has been made by the month, gives the heirs of the sailor only the wages to the time of his decease? I think it may be said that, in the case of article 13, the seaman, who is hired by the month, does not run the risk of calms, contrary winds and other accidents, which may render the duration of the voyage much longer than was to have been expected. On the contrary, in the case of article 14, where the hiring is for the voyage, the sailor runs all these risks; and hence the Ordinance has decreed, that, in recompense of the risk he runs of receiving only a certain sum for his services during the voyage, although its duration may have been much prolonged, his heirs shall be paid the whole of this sum, although his death, which is an accident of superior force, has much abridged the duration of the voyage.

This article takes effect even when the sailor dies a few days after the ship set sail, or even the same day.

193. The heirs of the seamen are treated still more favorably when the engagement was made on freight or profit. The fourteenth article, after having spoken of the case of engagement for the voyage, says: *and if he sailed on profit or freight, his heirs shall enjoy his whole share*, which was assigned him by the bargain out of the freight or profit, *provided the voyage had been commenced.*

Is it just, it may be said, that a sailor, who, having died shortly after the departure of the ship, has rendered very little service, should acquire the same share in the freight or profit, as he who has served during the whole time of the voyage? To this it may be replied, as in the preceding article, that he would have received only this share in the freight or profit, as a full compensation for his services, if accident had prolonged

the duration of the voyage to an immoderate length, although this compensation would then fall much short of the just price of his services; and that for this reason he deserves to have the same share when the time of his services has been abridged by death. It is indeed just, that, having run the risk of receiving a very inadequate compensation in case the voyage had been prolonged by accidents of superior force, he should receive a compensation superior to the exact price of his service, when accidents of superior force have abridged its duration.

194. The two articles, which we have now cited, refer to the ordinary accident of the death of a sailor during the voyage. The next article(*d*) is for the particular case when the sailor is killed in defending the ship. It says: *The wages of a seaman killed in the defence of the ship shall be wholly paid as if he had served all the voyage, provided the ship arrives safely in port.* This article applies to the case of a sailor who is killed either fighting, or working the ship during the fight; it matters not whether he was killed by a cannon-ball shot by the enemy, or fell down in working during the fight and died of the wound received in falling: in all these cases it is proper to say that he was killed in defending the ship. But if a sailor should fall down working the ship and be killed, at any other time than during a fight, his case would come under the two preceding articles.

The heirs of a sailor, who is killed in defending the ship, in whatever manner he was hired, ought to be paid the whole of his wages. For instance, if he be hired by the month, his heirs shall not merely be paid his wages till the time of his decease, but they shall be paid for all the time to the conclusion of the voyage. In like manner, if he is hired by the voyage going and returning, and has been killed in the defence of the ship while going, his heirs are not merely paid half his wages, but the sum total, as if the sailor had served the whole time going and

(*d*) *Des loyers des matelots*, art. 15.

returning. Finally, if he is hired on shares for a vessel armed as a cruiser, account is to be rendered his heirs not only of his share in the prizes made before his death, but even of that, which he would have had, if he had lived, in all the captures made after his decease during the time of his engagement. The reason of which is, that the sailor having been killed in defending the vessel, and having contributed to her preservation, his death is a common average, for which his succession ought to receive an indemnity.

It also follows from this, that, whatever has been paid the heirs of a sailor, in the preceding circumstances, over and above what would have been received in ordinary cases, being a general average, therefore this surplus, as Valin remarks, ought to be at the charge of the merchant-freighters as well as the ship-owners, and a contribution ought to be made between them on account thereof, as in case of jettison or other gross averages.

195. What is added at the conclusion of this article, *provided the ship arrives safely in port*, is applicable not only to the regulation of this article, but also to that of the two preceding. Whether the sailor died in the natural course of things, or in the defence of the ship, previously to the arrival of the ship at the place of her destination; if after his death some accident happens which occasions the total loss of ship and cargo, so that nothing remains, the heirs have no claim for the wages. In all these cases, the wages due the heirs of a sailor who has died during the voyage, as well as those due other sailors remaining on board the ship, are not to be paid by the master or owner except on the ship or wreck and on the freight due for the merchandise. Of course, if there remains nothing, neither ship nor goods, there is nothing out of which the heirs of the sailor can be paid his wages. So likewise the heirs of a sailor killed in defending the ship cannot be paid, if nothing remain of the ship or goods; for merchants are obliged to con-

tribute for general average only on the goods which remain, and ship-owners are obliged to contribute only on account of the ship or what remains of the ship.

196. When any goods are preserved, the heirs of a sailor who dies a natural death, as well as sailors who survive, as they have only the master and owner their debtors for wages, cannot satisfy themselves out of the goods, but only out of the freight due for these goods. They can stop nothing but the freight in the hands of the merchants to whom the goods belong. But the heirs of sailors killed in defending the ship can satisfy themselves out of the goods saved, as well as the wreck of the ship, the indemnity due them being a common average, to which the goods ought to contribute.

197. Observe, that it is only when the fight prevents the capture of the ship by pirates or enemies, that there is ground for contribution; for if the ship had been taken, although means were afterwards found to save her, the damages incurred in the fight would not be common average, since an average is never common, and never gives rise to contribution, except when it has effectually procured the preservation of ship and cargo, and therefore the heirs of a sailor killed in such unavailing fight ought to be paid, not according to the fifteenth, but according to the thirteenth and fourteenth articles.

ARTICLE II.

Of the case in which the master, through his own act, has not enjoyed the services which the sailor let to hire.

198. According to the general principles of the contract of letting to hire, the hirer who has not enjoyed the thing let, during a part of the time for which it had been let, or even has not enjoyed it all, is not in any respect discharged from the payment of wages, when it is through his own act that he has not enjoyed it; and this takes place even if he has been pre-

vented from enjoying it, provided the obstacle proceeds from his part.(*d*)

This principle is not always rigorously followed; for in the hiring of services, a master who dismisses his servant without just cause before the expiration of the time for which he was hired, although it is by the master's own act that he does not enjoy the services let him, yet he does not owe the entire wages, but only under a deduction of what the servant can probably gain in letting himself elsewhere.(*e*)

With regard to the hiring of seamen, we must distinguish the different cases in which the master, by his own act or by that of his agents, has not enjoyed the services hired. These cases are the relinquishment of the voyage by the owners before the ship sails; when it is afterwards broken up; and when a sailor is dismissed without good cause before or after departure.

199. I. The Ordinance says,(*f*) *If by the fault of the owners, master or merchants, the voyage is relinquished before the departure of the vessel, sailors hired by the voyage shall be paid for the days they labored in equipping the vessel, and a quarter part of their wages.* This regulation is very equitable; even if his own act or that of his agents deprives the master of the sailor's services, nevertheless, since they can easily let their services to others, it would not be just that they should be paid full wages: no more would it be just that the master should be wholly discharged; because it may be that the sailors are unable to let themselves till after some time, and that their new bargain is less advantageous to them than that for the voyage which has been relinquished. Hence the Ordinance has taken a middle course, in awarding to the sailors, besides pay for their labor, which could not be refused them when it had been performed, a fourth of the wages for the voyage which is relinquished.

(*d*) *Traité du Contrat de Louage*, n. 142.
(*e*) *Ibid.* n. 173. (*f*) *Des loyers des matelots*, art. 3.

200. If the sailor should suffer nothing by the relinquishment of the voyage, as if he should immediately find another more advantageous bargain for service in another ship, would he be permitted to demand the fourth part of the wages according to the Ordinance? The reason for doubting is, that this fourth seems to be granted him as damages on account of the non-performance of the contract; now if he has lost nothing by this non-performance, he cannot claim any damages; and of course he cannot claim the fourth part which is their equivalent. Notwithstanding these reasons, it seems to me that the sailor is entitled to the fourth; because this portion of the wages adjudged him by the Ordinance is not exactly the price of the damage which he may eventually suffer from the non-performance of the contract; but it is rather the price of, and a species of general compensation for, that which he runs the risk of suffering, whether it amounts to much more than a fourth of the wages, or whether it is less, or whether it is nothing at all: for if it had happened that the sailor was unable to let his services, and that his damage had amounted to much more than a fourth of the wages, he could not claim any more than is granted him by the Ordinance; and therefore what is here granted him ought not to be refused if by the event his damage amounts to less, or even if he suffer no damage whatever.

201. The article says: *if by the fault of the owners, master or merchants the voyage is relinquished.* The master is liable for the damages of the sailor resulting from the breaking up of the voyage, although this should not happen through the act of the master or owners, but through that of the merchant to whom the ship was let for the conveyance of his merchandise: because the master is to receive an indemnity from the merchant, and the damages due the sailor in consequence of this relinquishment make part of those due the master from the merchant through whom the relinquishment happened.

202. The Ordinance adds:(g) *and those engaged by the month shall be paid in proportion, regard being had to the ordinary length of the voyage.* These words, *in proportion,* signify that sailors engaged by the month, as much as those hired by the voyage, ought to receive, over and above the pay of their labor in fitting out the ship, a fourth of the sum to which their wages would probably amount, if the voyage was performed; and as this sum would depend on the length of the voyage, its length is estimated in reference to the time, which similar voyages ordinarily and generally last. For instance, if the sailor is hired by the month on a voyage, which going and returning is usually made in eight months, he shall be paid for two months.

203. II. The Ordinance proceeds: *but if the voyage be broken up after it is begun, the sailors hired for the voyage shall be paid all their wages, and those hired by the month what is due them for the time they have already served, and for the time which will be necessary for returning to the place of departure; and both shall be paid for their maintenance until they arrive at the same place.*

This applies to the case in which the voyage is *broken up by the fault of the owners, master or merchant,* as had been said in the first part of the third article, with which the second is connected.

This article seems to me clear in both parts: nevertheless, Valin does not find it such: he pretends that the Ordinance, in the case where the voyage is broken up before its commencement, having rendered the condition of sailors hired by the voyage, and of those hired by the month equal; we ought to suppose it meant they should be likewise equal in case the voyage is broken up after its commencement; and that of course in the same manner as the entire wages are paid a sailor hired by the voyage, we ought to suppose and understand

(g) *Des loyers des matelots,* art. 3.

that a sailor hired by the month can exact the payment of wages for every month the voyage would have lasted going and coming, if it had not been relinquished; and that what is said by this article as to the payment of wages to a seaman hired by the month for the time he has served, and for that necessary to return home, ought not to be applied to any case except where the time of his service, joined to that which is required for his return, would exceed that of the ordinary duration of the voyage.

I agree that if the Ordinance had this intention, which Valin attributes to it, of granting a sailor hired by the month, wages for every month which the voyage might last, Valin was right in saying that this article was inexplicit and ill-written; but the question is, whether the Ordinance really had such an intention, and if a law can be made to speak what it has never spoken. I think not: what Valin desires to have considered an interpretation of this passage is rather an addition to the law which does not say the least word of such an import; it says in general terms that in case the voyage is relinquished after its commencement, the seaman hired by the month shall be paid for the time he has served and for the time required for returning. It is contrary to every rule of interpretation to restrict the general terms of a law to a particular case, and especially to a particular case imagined by the author of which the law says not a word. But why, says Valin, should the condition of a sailor engaged by the month be different from that of one engaged by the voyage? I reply, that the difference comes from the different natures of these engagements. In engagement by the voyage, the wages, which the master promises to pay the seaman, consist in a fixed sum which is due him whatever may be the duration of the voyage, whether greater or less; although the length of the voyage is shorter because it is broken up, than it would have been if the ship had proceeded to the place of her destination, it does not fol-

low that the master ought to be discharged from a part of his obligation, because the breaking up of the voyage was his own act, and a debtor cannot by his own act discharge himself from his obligation. On the contrary, in the engagement of sailors by the month, the duration of the voyage regulates the wages; and when its length has been abridged by the relinquishment of the voyage, nothing is due except wages for the time it lasted; but to this is added, as damages, pay for the time necessary to return, which is paid him as if he had served in the ship during this time, although he has not served.

Valin, to maintain his opinion, says that the Ordinance having estimated the time, which it is probable the voyage would have lasted, to give the sailor wages for one fourth of it, we ought to conclude that it meant the time, which the voyage would probably last, should be estimated in order to give the sailor wages for it in case the voyage is broken up after its commencement. I answer that perhaps this might be concluded if the Ordinance had not explained itself as to the indemnity to be paid a sailor when the voyage is broken up after its commencement; but as it has fixed a particular species of indemnity for this case, we cannot apply to it what has been ordered for the case of relinquishment before departure.

Valin says farther, that indemnity, when the voyage is broken up after its commencement, ought not to be less than when it is brokeu up before its commencement; and still it might be less, even if the relinquishment happened but a short time after departure. I think a sailor engaged by the month might then, abandoning this indemnity, demand that which takes place when the voyage is relinquished before its commencement.

The Ordinance in another place makes the same distinction, with that which we have been considering, between sailors engaged by the voyage and those hired by the month, and thereby serves to destroy this interpretation given by Valin.

It says,(*h*) that *if the ship is voluntarily*, and of course by the master's act, *unloaded in a place nearer than that which is designated in the contract of affreightment, the wages* promised a sailor hired by the voyage *shall suffer no diminution, but if they are hired by the month they shall be paid for the time they have served in both cases;* that is, whether the voyage was broken up, and abridged by the act of the master, or whether it was prolonged.(53)

204. The Ordinance does not say in that part of the third article, which concerns the case in which the voyage was broken up after its commencement, that the sailors shall be paid for their labor in fitting out the ship. It is evident that a seaman hired for the voyage ought not to receive pay therefor, because he receives in this case wages for the voyage, in which that labor is included; nor can the sailor who is engaged for the month claim them; since it is enough that they are not granted him by the Ordinance.

205. The Ordinance adds:(*i*) *and both*, that is to say, those engaged by the month as well as those engaged by the voyage, *shall be paid for their maintenance to the same place*, that is to say, the place of departure. The regulation of the first of August 1743, has fixed this charge, declaring(*j*) that when sailors and other seamen are sent home by land, the charge of it shall be paid in the proportion of four *sous* the league for officers, and three *sous* the league for mere sailors. When they are sent home by sea in another vessel than that for whose service they were hired, if they gain wages in this ship, the master who dismissed them owes nothing for their maintenance; if they have been received only as passengers, the master who dismissed them owes the expenses of their passage and subsistence, according to the terms on which he can agree with the master by whom they are sent home.(*k*) Finally, when the

(*h*) *Des loyers des matelots*, art. 6. (*i*) *Ibid.* art. 3.
(*j*) Art. 4. (*k*) *Ibid.* art. 5.

ship, in which they are sent, does not go directly to the place of their departure from whence the vessel sailed for which they were hired, the master, beside their passage by sea, should pay them the expenses of their journey by land from the place where they left the ship to the place from whence they originally sailed.

206. III. The Ordinance directs what shall be given the sailor in case he is dismissed without cause either before or after the departure of the ship. *If the master*, it says,(*l*) *discharge a sailor without sufficient reason before the voyage commences, he must pay him one third of his wages; and if after the voyage is begun, the whole, with the expenses of his return, without having a right to pass them to the account of his owners.* It is through his own act that the master does not enjoy the services which the sailor has let him, and when he discharges a sailor without sufficient cause, he ought not, according to the rigor of the principles of the contract of letting to hire, to be discharged from his wages. Nevertheless, as the sailor can easily let himself to others, when he is discharged before the departure of the ship, the Ordinance decrees him only a third.

The master is treated less favorably in this case than when the voyage is broken up by his own act, or by that of the shipowners or merchants, because then he is only required to pay a fourth of his wages to the sailor who is discharged before the departure of the vessel. The reason of the difference is, that the voyage itself may be relinquished for good reasons, and the discharge given the sailor in this case is not injurious to him; and therefore the master ought to be treated more favorably in this case than when he discharges the seaman without relinquishment of the voyage and without cause, such discharge being in some measure injurious to the sailor discharged.

207. In the last case, which is when the sailor is discharged

(*l*) *Des loyers des matelots*, art. 10.

without sufficient cause after the voyage is begun, the master is treated according to the rigor of legal principles; he owes the sailor discharged entire wages; and the Ordinance makes no distinction between the different species of engagement. The sailor engaged by the month, as well as one engaged by the voyage, may demand his entire wages, that is to say, when the voyage is ended he may demand wages for every month the voyage lasted, in the same manner as if he had not been discharged but had served during the whole voyage.

208. The Ordinance moreover orders that the master pay the sailor the expenses of returning, estimated by the league, as above stated.

No mention is made of the expenses of return in the preceding case of a discharge given the sailor before the departure of the ship, because the sailor is supposed to be in the place of his residence and where he was hired; but if the master had caused a sailor to come express from another place, Valin is of opinion that he ought to be paid the expenses of his return to the place from which he had been caused to come.

209. The sufficient causes for discharging a seaman are intemperance; want of capacity for the service on which he was hired; when he is a blasphemer, a thief, refractory, quarrelsome, so as to cause disorder in the ship, &c.; and if he is discharged for any of these causes, as in this case it is by his own act, and not by that of the master, that the services are not performed, the sailor has no claim for wages except for the services rendered before his discharge; he can claim none for those services he has failed to render, nor any thing for expenses of return.

210. Hitherto we have spoken only of sailors hired by the voyage or month; but the Ordinance explains itself as to those hired on profit or freight, saying:(*m*) *As for sailors and others of the crew going on profit or freight,—if the voyage be brok-*

(*m*) *Des loyers des matelots*, art. 7.

en up, retarded or prolonged by means of the merchant-shippers, the seamen shall have a share of the costs and damages allowed the master. This regulation arises from their connexion of partners; having been associated for a certain part of the freight or profit the ship was expected to produce, they ought to receive a similar share in the indemnity. The Ordinance adds: *who,* that is, the master, *as well as the owners* of the ship, *shall be liable to the sailor, if they occasion the hindrance.* These damages should be assessed by arbitrators chosen by the parties.

ARTICLE III.

When and how the payment of seamen's wages ought to be made.

211. The declaration of the king of the eighteenth of December 1728 directs,(*n*) *that masters shall not pay the sailors of their crew the wages due them in a foreign country, under pain of a hundred livres fine;* and *that masters, under pain of sixty livres fine, shall give sailors nothing on account of their wages either in foreign countries, or in the ports of the kingdom to which they may sail for the purposes of commerce, or at which they may touch, without the consent of the consul in foreign countries, and of the class-officers in France.*

This law was passed to prevent the desertion of sailors: the fear of losing their wages, which are not due till the voyage is ended and they have returned, and which they would lose by deserting, being a powerful motive to prevent their desertion. There is also another reason, namely, to prevent their debaucheries, and to see that their wages, being paid them after their return and in the place of their residence, should serve to supply the wants of their family.

212. An order in council of the nineteenth of January 1734

(*n*) Art. 5 & 6.

has added a new regulation, to wit, *that in case the vessel is disarmed in a place other than the place of departure, the wages of seamen shall be paid into the hands of the class-officers, and not remitted the seamen until their arrival.* This has been so ordered to the end that they might not consume by debauchery, in the place of debarcation or on the way, money which ought to serve for the subsistence of their wives and children.

213. An Ordinance of the nineteenth of July 1742 says, that *when a ship is disarmed in the colonies of America, the discount of the sailors shall be made in presence of the marine officer of the colony, and the master shall remit him a bill of exchange for the amount drawn on the owner in France: the said discount and bill of exchange to be sent by this officer to the commissary of the marine for the place where the vessel was armed, who, when paid the bill of exchange, shall pay over the money to the sailors on their return or to their families.*

These regulations have been renewed by a regulation of the eleventh of July 1759.

214. Is payment made by the master to sailors of the whole or a part of their wages, contrary to the regulations above mentioned, valid? It may be said for the affirmative, that these regulations only pronounce a fine against the master, without annulling the payments. This case is different from that of persons of the ship's company making the sailors loans or advances in the course of the voyage, which the sailors promise to repay out of their wages after returning; as to which, besides a fine, the Ordinance of the first of November pronounces the nullity of all such loans and advances. The reason of the difference is that in this last case the lenders become plaintiffs; now their demand cannot be granted, because the law admits no persons to an action to compel the execution of a contract which they have made in defiance of its express prohibition; but when the master has made payments of their wages to

sailors contrary to the disposition of the law, it is the sailors who demand what they have already received; now good faith opposes their demand and renders it inadmissible according to the rule,(o) *bona fides non patitur ut bis idem exigatur.* If the master has offended against the law in paying them, on their part they offend against good faith in demanding what they have received; and it is a rule that *in pari causa delicti melior est causa rei quam actoris.*

ARTICLE IV.

Of other obligations of the master.

215. Beside the obligation which the master contracts to pay the sailor whom he has taken into his service the stipulated wages, he contracts other obligations.

Such is that of nourishing him during the time he continues in the service of the ship. Such also is that of furnishing him with necessary dressing, if he is taken with any sickness during the voyage or is wounded in the service: which we have already discussed.

216. It is likewise one of the obligations of the master to pay the sailor in certain cases his expenses home.

These cases are, first, when the master in the course of the voyage discharges a sailor without sufficient cause; and then, as we have seen before, he is liable for the expenses of his return. But if the sailor himself requested a discharge, or if he was discharged for a sufficient cause, in neither case is any thing due as expenses of return, and whatever is given him for that purpose is to go in payment of his wages.

217. The second case is that in which a sailor fallen sick or wounded in the service of the ship during the voyage has been left on shore in a port where the ship stopped. I think the

(o) *Digest. l. 57, de reg. juris.*

master is obliged to pay him the cost of his return home after his recovery. The Ordinance, it is true, has not formally directed it; and the regulation of the first of August 1743, which imports,(*p*) that the master ought in this case to leave a sum for his cure and return home, does not say expressly whether the sailor shall receive the cost of his return beside his wages or in part payment of them; but the spirit of the Ordinance, where it says,(*q*) that *if a mariner be wounded in the service of the ship or fall sick during the voyage he shall be paid his wages and taken care of at the charge of the ship*, seems to mean that the sailor should receive an indemnity, and of course that he should be paid his wages beside the expenses of returning home.

218. The third case is when the master disarms either without the kingdom, or in a port of the kingdom other than that from which the vessel sailed: for the sailors having let their services to hire out and home, ought to receive the expenses of their return to the place of departure beside the wages they are there to be paid.

If the vessel should disarm at the place of departure, but among the ship's company there were some whom the master had caused to come express from another department, he should pay them, beside wages, the expense of returning; but *secus* if they were not made to come on purpose. Valin cites two sentences of the admiralty of Marseilles conformable to this regulation, one of the month of April 1740, and another of October 1752.

219. When the master discharges sailors because the ship is not in a condition to be navigated, Valin says it was adjudged at Marseilles in September 1752, that nothing was due for expenses of return, and they receive money therefor only in part payment of wages fallen due.

I think it ought to be supposed to have been by some acci-

(*p*) Art. 3. (*q*) *Des loyers des matelots*, art. 11.

dent of superior force, as a storm, that the ship was incapable of being navigated; for if at the time of departure she was unfit to make the voyage, the relinquishment of the voyage proceeding in this case from the fault of the master who has rashly undertaken it with a ship not in a condition to pursue it, the charges of returning are due the sailors discharged. On the contrary, if the ship was made unserviceable by superior force, the master can excuse himself from the payment of the sailor's expenses home, by saying that it was by superior force that he was obliged to dismiss them, and that nobody is responsible for an accident of superior force. Nevertheless, Valin is of opinion that even in this case the charges of returning are due the sailors, unless the owners make an abandonment of the ship. He thinks also that in case of the shipwreck or breaking of the vessel, the sailors ought to be paid out of the price of the remnants, not only the wages fallen due, but the expenses of returning; although nothing of the kind is asserted by the Ordinance.

220. The expenses of returning, in cases where they are due, are regulated by the regulation of the first of August 1743.

221. The question has been raised, whether the master was obliged to pay the ransom of seamen, when they were made captives or prisoners. The Ordinance makes a distinction in this particular. If it be during the disorder of the capture or pillage, *sailors taken in the ship and made slaves shall claim nothing of the master, owners or merchants, for the payment of ransom.*(r) The capture of sailors is in this case a simple average, which ought to be sustained by him who suffers it, and for which there is no remedy. It is purely an accident which regards him alone, and it cannot be said that he was taken for the service of ship.

It is otherwise when the seaman has been made prisoner or

(r) *Des loyers des matelots*, art. 16.

captive in executing a special commission for the service of the ship: it is then for the service of the ship that he has been made prisoner or slave, and he ought to receive an indemnity. Hence the Ordinance says:(s) *But if any of them be taken when sent on the service of the ship by land or sea, his ransom shall be paid at the expense of the ship.*

The Ordinance then adds: *and if the service was for the ship and cargo, it shall be paid at the cost of both, provided they safely arrive in port.* In this case it is a common average which gives rise to contribution between the owners of the ship and the merchants whose goods compose the ship's cargo.

222. Finally the Ordinance adds: *the whole however not exceeding three hundred livres without prejudice to his wages.* By this expression, *without prejudice to his wages,* the Ordinance declares that the master ought to pay the sailor wages beside his ransom; which is to be understood of wages for the whole voyage, although his captivity should have prevented his serving in the ship; in the same way as the sailor, who is wounded in the service of the ship, is paid the whole as if he had always served.

223. The next article relates to the case of contribution to the ransom of seamen made prisoners or slaves for the service of the ship and cargo. It says:(t) *The regulation of sums destined for the ransom of seamen shall be made by the master instantly upon the arrival of the ship, and the money deposited in the hands of the principal owner, who shall forthwith employ it in the ransom under pain of forfeiting four times the sum for the benefit of the seamen in captivity.* Nothing requires more celerity than the ransom of captives, for which reason the master ought immediately to procure the contribution, and if he neglects to acquit himself of this duty he may be prosecuted by the king's proctor in the admiralty, as observed in this place by Valin.

(s) *Des loyers des matelots,* art. 17. (t) *Des loyers,* art. 18.

224. Beside these obligations, which we have detailed, arising out of the nature of the contract, the master and owners of the ship may contract others by particular clauses of the contract, which they have made with the seamen and other members of the ship's company.

Such is that, by which the owners permit any person of the crew, on entering the service of the ship to place there a certain quantity of goods without paying any freight. By this agreement, the owners are obliged to leave room enough to contain these goods; and on failure to leave it, they are liable to this person for his costs and damages.

The right arising from such an agreement, cannot, according to Valin, be ceded to a third person; it is a privilege merely personal, which he, to whom it has been granted, cannot use except for the stowage of his own goods laded on his own account or under the title of his parcel; if he does not make use of this right, it being only for him to use it, he cannot claim any compensation.

225. Except in case of agreement, *sailors cannot lade any goods on their account, under pretence of portage or otherwise, without paying freight, unless it is mentioned in their engagement.*(u)

Portage was the quantity of goods which the members of the ship's company, before the Ordinance, claimed a right to lade in the ship; which was called *the ordinary* or *the portage of mariners.*

The prohibition contained in this article extends to all the ship's company, even the master; neither of them can carry with him in the ship any goods without paying freight, except so much as he can put in his chest.

(u) *Des loyers*, art. 2.

ARTICLE V.

Of the actions which seamen have against the master and owners of the ship; and of the privilege and prescription of these actions.

226. The sailors and other persons in the company, who have let themselves by the voyage or month, have an action *ex locato* against the master for the payment of their wages and for other things for which he is responsible. This action arises from the obligation, which the master has contracted by the contract of letting to hire, by which he has taken them into the service of the ship. They have likewise the action *exercitoria* against the owners, who, in appointing the master to the command of the ship, are considered as acceding to all the obligations which he should contract with persons taken into the service of the ship.(54)

227. The Ordinance says:(v) *The wages of seamen employed in the last voyage of a ship shall be paid in preference to all other debts.* Valin well observes that they are not paid till after the charges of seizure and distribution, as well as after the charges of keeping for the ship, tackle and furniture, and also the charges of anchorage. He likewise places before seamen the debts incurred to refit the sails and rigging, because the ship would sell so much the better on that account.

228. According to the Ordinance,(w) actions for the wages of seamen and other persons of the ship's company are prescribed in a year after the conclusion of the voyage.

229. With regard to sailors hired on freight or profit, their engagement comprizing a contract of partnership, they have an action *pro socio* to obtain payment of their part of the freight or profits.(55)

(v) *De la saisie des vaisseaux*, art. 16. (w) *Des prescrip.* art. 2.

NOTES.

NOTES.

Note 1, *p.* 3. Nicolas Boyer, or Nicolaus Boerius, originally an advocate, afterwards a counsellor in the superior council, and finally president of the parliament, in the city of Bordeaux, died in 1539 at the age of 70. He left *Commentaires sur les Coutumes de Tours, de Berri et d'Orleans,* an edition of the *Novels* of Justinian, a tract *De Legatis a Latere,* and another *De Seditiosis* and the *Décisions* referred to in the text, which latter book, in its time, had a very extensive circulation. *Dictionnaire Historique; Buderi Bibliotheca Juris Struviana; Robinson's Adm. Rep.* iv, 10. *note; Johnson's N. Y. Rep.* xiv, 453.

Note 2, *p.* 3. See *Abbott on Shipping, p.* 184, 185; *Hargrave's Coke Littleton, f.* 229 *note; Emérigon, Des Assurances, t.* i, *p.* 309. *Valin Sur l'Ordon,* i, *p.* 617.

Note 3, *p.* 4. The original has it: *louer à la cueillette.* This is a species of contract for conveyance in a general ship, for which our language affords no distinctive name. The old *Treatise of the Dominion of the Sea,* imperfectly renders, *charger à la cueillette,* lade *by parts,* in the translation of the Marine Ordinance, *p.* 303. "Affreightment *à la ceuillette,*" says Valin, "is made by the ton or quintal, but with this distinction, that here the master is not legally obliged to receive the goods unless they are enough to complete or nearly complete his cargo, that is to say, to fill about three quarters of the ship. Until then he is not absolutely engaged, without an express agreement to the contrary. Whereas, if his ship is not let *à la cueillette,* he may be forced to receive on board all the goods for which he has promised a place," &c. *Commentaire,* i, 640

Note 4, *p.* 6. Mandate is a contract by which one person undertakes gratuitously to perform a commission for another person. The performance is gratuitous; for the distinction between a mandate and a letting to hire is, that in the former the service is considered an act of kindness growing out of

friendship, and in the latter the service is an act purely interested. But the contract of mandate, although the service is gratuitous, nevertheless creates definite obligations. The mandator becomes bound to ratify whatever his agent does in pursuance of the mandate, and to repay all proper and reasonable expenses incurred, and sometimes repair the losses undergone by the mandatary in performing the business entrusted to his management. And the mandatary, on his part, after having accepted the commission, is bound to execute it faithfully, using all reasonable diligence and care, and neither falling short of nor exceeding the limits of his authority: otherwise he is answerable in damages to the mandator. See above *p.* 21; *Digest. lib.* xvii, *tit.* 1; *Domat, lib.* i, *tit.* 15; *Jones on Bailments, p.* 60 *et seqq.*

Note 5, *p.* 9. The terms *dommages et interêts* are always combined, in the French law-books, to signify the gain which a person has failed to make or the loss he has sustained. *Pothier, Des Obligations, n.* 195.

Note 6, *p.* 10. By the civil law when either party has a deficiency of proof to support his allegations, he may refer the matter in issue to the oath of his opponent, which oath decides the cause, and is thence called *decisory. Digest. l.* xii, *tit.* 2; *Pothier, Des Obligations, n.* 818; *Domat, l.* iii, *t.* 6, *s.* 6; *Argou, Droit François,* ii, 515.

Note 7, *p.* 10. As to the master's ability to write, see *Boucher, Droit Maritime, p.* 247.

Note 8, *p.* 11. By the Ordinance the clerk is a sort of notary in a vessel during a long voyage, whose duty it is to keep a journal of every thing which concerns the ship, and authenticate solemn instruments. *Ordon. De l'écrivain, ibique Valin; Boucher, Droit Maritime, ch.* 15.

Note 9, *p.* 12. The following case in point is reported in *Emérigon, Des Assurances,* i, 328. "The *sieur* Morra freighted the bark of captain Gipier to carry a cargo of grain. The ship was loaded with the grain. The captain wished to sign with the clause, *as said to be;* Morra demanded that the signature of the bill of lading should be pure and simple. He alleged that the captain or his agent had received notice to assist at the measuring, and had assisted. An inquiry was ordered. The facts in the interlocutory were not proved. The opinion of the court was that the captain, not having engaged to assist at the measuring, and not being proved to have consented to assist thereat, was not obliged to sign the bill of lading without the customary limitation." Sentence was rendered accordingly December 15th 1753.

Note 10, *p.* 13. All the learning on the subject of bills of lading is collected in *Emérigon, Des Assurances, ch.* 11.

Note 11, *p.* 18. Abbott thinks the master should be responsible for every deficiency, because he covenants that the ship is tight, staunch and sufficient. It appears to the same author, that the rules laid down by Pothier himself, in that part of his contract of letting to hire to which he refers above, warrant the conclusion that the master is responsible even after an examination. The following is the passage referred to by both writers. "When the letter to hire ought, by his profession, to know the defect of the thing let to hire, he must answer for the damages of the hirer; and it is unnecessary to inquire whether he did or did not possess any knowledge of the defect. For instance, if I hire casks of a cooper to contain my wine at the vintage, and the casks are made of bad wood, the cooper is bound to make good my loss in consequence of this defect; and he would not be permitted to say that he was ignorant of the defect; for his profession required of him to know the quality of the wood which he had made use of, and to use none which was of a bad quality. If it were a shop-keeper, instead of cooper, his profession of shop-keeper required of him to be acquainted with the articles in which he dealt; he was to blame for meddling with a business which he did not understand." *Pothier, Contrat de Louage, n.* 119. See *Putnam* vs. *Wood, Mass. Rep.* iii, 481.

Note 12, *p.* 18. "The captain is liable for all damage done the goods by his fault; for, in consideration of the freight, he is bound to deliver the goods in the same condition in which they were received unless the damage proceed from an accident which he could neither see nor prevent." *Emérigon, Des Assurances,* i, 377: where he cites *Casaregis De Commercio dis.* 19 *n.* 19, *dis.* 23 *n.* 55 & 80, *dis.* 46 *n.* 3; *Consolato del Mare,* c. 59, 61, 73, 234; *Targa, Ponderazione,* c. 28, *n.* 7; *Guidon de la Mer,* c. 5, *art.* 5 & 6, *ibique Cleirac, p.* 254; *Roccus, Notabil. de Navibus, n.* 49.

Note 13, *p.* 18. "But this obligation also regards the time of peace, so that the master may always show to whom his cargo belongs, that on his arrival each one may recognize the goods addressed to him, and that officers of the customs may be able to ascertain on the one hand whether the duties on the goods were paid at their departure, and on the other whether prohibited articles have not been embarked without permission." *Valin, Nouv. Comment.* i, 129.

Note 14, *p.* 20. Valin answers several objections to his opinion and remarks, that he considers the goods to be sold for

the debt of the ship, that is, for the proper and particular debt of the owner of the ship; and therefore it is for him to pay it independently of the subsequent fate of the ship, in the same manner as if the master had borrowed the like sum in a foreign port and drawn bills of exchange for the amount.

Note 15, *p.* 21. *Kuricke, tit.* vi, *art.* 2, *Cleirac, p.* 88, *n.* 2, and Valin *ubi supra* agree with Pothier on this subject; but *Emérigon, Contrats à la grosse, p.* 445, and *Abbott on Shipping, p.* 243, differ from him, and cite in support of their opinion the *Consulate of the Sea, ch.* 105, the *Judgment of Oleron, art.* 22, and the *Regulation of Antwerp, art.* 19. Emérigon says that money raised in this manner, when the ship is afterwards lost, is a sort of forced loan at *respondentia.*

Note 16, *p.* 28. "If the owners do not actually disavow a contract of affreightment made by the master when he has exceeded his powers, the freighter cannot avoid the execution of his part of the contract under pretence that the owners, having been on the spot, had a right to make such disavowal. His case resembles that of a person who contracts with a married woman without her husband's authority; although the wife is not validly bound on her side, yet if she and her husband afterwards approve and ratify the contract, they can oblige the person who contracted with her to fulfil his engagements."

"When the owners are dispersed in different places and neither of them has been chosen to be present and superintend the affreightment of the ship, the contract of the master is absolutely valid, and cannot be shaken by the owners, they preserving their remedy against the master if he break his orders."

"In all cases, even when the master's affreightment is annulled by the disavowal of the owners, the master continues pledged to the freighters for the execution of the charter-party. They had a right to presume that, in making the contract, he possessed the requisite powers; and this is enough to authorize their recourse to him, as in the case of a mandatary or agent, who, although exceeding the limits of his commission, is not the less bound to fulfil the engagements which he has wrongfully made in the name of his principal." *Valin, Commentaire,* &c. i, 621, 623.

Note 17, *p.* 28. "*Liceat quærere, an magister navis alium substituere possit? Posse autem dubium non est, quum magister navis dicatur non solum quem exercitor, sed et quem magister navis, etiam ignorante et invito exercitore, præposuit. Omnia autem facta magistri præstare debet qui eum præposuit, et quamvis alias, ubi industria persona electa est, alius substi-

tui non possit, utilitate tamen publica suadente, jure quodam singulari in exercitoria aliud quod constitutum esse videtur, quia sæpe de conditione naucleri substituti inquirere nec tempus conceditur. Si tamen damni quid ob hanc causam exercitor patiatur, habet eo nomine cum primo magistro actionem ex locato vel mandato." *Kuricke, Res. Quæst. Illus. n.* xv.

Note 18, *p.* 28. See *Kuricke, Res. Quæst. Illus. n.* xx. *Grotius de Jure Belli ac Pacis, l.* ii, *c.* 11; *Loccenius de Jure Maritimo, c.* vii, *n.* 5.

Note 19, *p.* 31. We have not been able to find any notice of Clairat, nor of the work of his cited in the text by Pothier.

Note 20, *p.* 33. "It must be confessed that this regulation is too rigorous to be compatible with equity. The natural idea, which we form of an agreement for freight, is that it has no object but the goods laden in pursuance of it, that these goods are the sole pledge for its performance, and that of course it is only upon these goods that payment of freight can be enforced. From which it follows, that the freighter ought also to be quit of the freight on abandoning the cargo. Such is the opinion of Casaregis, *Dis. de Com. d.* 22, *n.* 46, & *d.* 23, *n.* 86 & 27."

"If this be just in the case specified in the following article, why not in all other cases? What reason is there for a difference? Is it not the same thing when the goods are so much diminished in price, hurt or deteriorated by their own vice, by the sea, shipwreck or other misfortune, as when liquors have leaked out of their casks so as to leave them almost empty? And is not this a case in which to say, *ubi eadem ratio ibi idem jus statuendum?*"

"Nevertheless, on account of this regulation of the Ordinance, the received opinion is that the master is not obliged to abandon the goods in payment of the freight. But as it is inconsistent that the merchant should pay the freight when the goods are of no value, whether their want of value has arisen from shipwreck, or whether their value has been absorbed by the expense of salvage; the plan has been adopted of not obliging the merchant to reclaim his goods in such circumstances, and he thus becomes discharged from the freight. Indeed there has been no case of this kind in which the master has required the freight of merchants, who have refused to claim their merchandise." *Valin, Nouveau Commentaire*, i, 670, 671.

Note 21, *p.* 37. *Quod intellige, ubi munere vehendi in parte non sit functus, pro parte enim itineris qua merces advectæ sint vecturam deberi, æquitas suggerit, et consequenter pro*

rata mercedis exonerationem fieri." *Straccha, De Navibus, pt.* 3, *n.* 24.

Note 22, *p.* 42. "When the obstacle, which has prevented the hirer from entering upon the enjoyment of the house let to him, or which has prevented his continuance therein, and obliged him to move out, is an obstacle interposed by the hirer himself, he cannot demand a remission of the rent. It is sufficient that the owner of the house stands ready to give the hirer the enjoyment of it, and that the hirer may occupy it by himself or his agents, to make the rent due." *Pothier, Traité de Louage, n.* 151. See also *Ibid. n.* 142.

Note 23, *p.* 46. "The reason why the Ordinance allows the merchant to be discharged on paying only half the freight," says Valin, "is undoubtedly because the master can find goods to replace those taken away from the ship; and that so half the freight is deemed sufficient to indemnify him for the delay this change may occasion; from which it evidently follows that this half freight is gained without return, although the cargo should afterwards be completed."

After remarking that the same is not the case with affreightment of the whole, because it is more difficult to find another person to take the whole ship, than to fill up a few quintals or tons, he subjoins that the whole freight would be due, if the merchant should refuse to lade the ship in pursuance of his engagement. *Nouveau Commentaire*, i, 646, 648.

Note 24, *p.* 48. Exception, in the law of France, is a general name for the plea entered by the defendant in an action. Exceptions are of three sorts: first, declinatory, that is to the jurisdiction of the court; secondly, dilatory, which is merely assigning a cause for not making a defense; and thirdly, peremptory, which is a complete answer to the action itself, and shows that it cannot lawfully be maintained. Peremptory exceptions again are either such as allege an estoppel, prescription and the like; or such as enter into the merits of the claim and tend to prove the action wholly groundless. It is this last kind of exception, which is properly denominated a defence; as when, in answer to the demand of a debt, payment is proved, or it is proved that the debt was never contracted, or, as in the case of the text, it is proved that the plaintiff owes the defendant a sum of money, which the defendant claims to have considered as a deduction, set-off or compensation. *Argou, Droit François, l.* 4, *c.* 12; *Pothier, Traité de la Procédure civile, pt.* i, *ch.* 2, 1, 2.

Note 25, *p.* 49. Both master and shipper being ordered to answer to the demand, so that all the persons, who have an

interest in it, may appear together, and the rights of none be sacrificed or endangered.

Note 26, *p.* 50. As privileges are frequently mentioned in this treatise, it may not be amiss to explain the nature of these securities.

The laws of France gave the creditor three species of security on the estate of the debtor, namely, a pledge, an hypothecation and a privilege. The first is a pledge, *pignus*, by which the actual possession of a chattel was transferred to the creditor, either on agreement, as a pawn for money due, or on judicial process for satisfaction of a judgment rendered, or security for judgment to be recovered in an action pending. The second is hypothecation, by which lands and houses became specifically liable for the payment of a debt, but remained in the owner's possession. Such is the distinction between pledge and hypothecation, which however was not always observed.

Hypothecation is either conventional, arising from an express agreement, or implied in law; thus minors, idiots and prodigals, have an implied hypothecation on the property of their guardians for the balance of his account, the church on the property of prelates guilty of mal administration, and the king on the estate of farmers and receivers of the revenue. The consequences of hypothecation are two, the preference of hypothecary creditors in order of priority, and a right to follow the property into the hands of a purchaser, and oblige him to pay the debt or give up the lands. The same right could apply to moveable property by the civil law; but was confined to immoveable property by the law of France. Whence the maxim in the text, *moveables are not followed into the hands of a stranger*.

As to moveables then, which are not in the possession of the creditor, he may seize them for a liquidated debt on mere attachment. The general principle is, that seizure can be made only for debt on a contract passed before notaries, or in execution of a judgment; but to this there are many exceptions. Some things however, as in our law, are not liable to seizure; the creditor being required to leave things necessary for the subsistence of the debtor. The goods seized may be sold after appraisement, the creditors being satisfied according to priority of seizure, except in case of the debtor's insolvency, when all the creditors share in proportion to their claims, unless some of them are privileged creditors.

The third species of security is a privilege, that is, a right, which a certain creditor has, by the nature of his credit, to be paid in preference to other creditors, even those prior in time,

and who possess an hypothecation. Thus he, who sells a thing, or he who lends money for the purchase of a thing, has a privilege on it for the price; he, whose money has been lent for the repair or preservation of a thing, as to secure lands from the current of a river, or to save a house from falling, has a privilege on the thing; the creditor, who has lent money to make improvements, has a privilege on those improvements; mechanics, laborers, architects, and others who furnish materials, labor or money for any work, have a privilege on it for the payment of their wages; carriers have a privilege on the goods carried for the payment of their hire, tolls, customs and the like expended on the goods; land-holders and owners of houses have a privilege on the produce of the soil and the tenant's furniture for the rent; funeral charges, expenses of proving the will, making inventories of property, and other necessary charges of the same kind, are privileged before all other debts of the deceased. See *Domat, liv.* iii, *tit.* 1; *Argou, Institution au Droit François, l.* iv, c. 3.

The application of these principles to marine affairs will be constantly recurring in the course of the treatise.

Note 27, *p.* 50. A prescription is perfectly similar to our limitations, by which certain actions are required to be brought within a stated time, or otherwise the right of action is forever lost and barred. The principle, upon which they are founded is likewise the same, to wit, presumption of payment, and of course claims are saved and renewed alike in both by an acknowledgment of the debtor. *Pothier, Des Obligations, pt.* iii, c. 8.

Note 28, *p.* 55. The same obligations and duties are deducible from the contract, whether considered as the hiring of labor or the hiring of a thing. When the charterer takes the ship into his possession, appoints the master himself and puts the vessel in sailing order, it is a contract for the hiring and letting of a thing as between the owner and charterer. As between the master and the owner or employer it is, however, always a hiring and letting of labor; and perhaps it would be more elegant to consider it as such in all cases; the master being generally hired to carry the goods of the shipper, but retaining possession of the ship, and using her as his instrument for making the conveyance.

Note 29, *p.* 59. Emérigon, (*Des Assurances, ch.* 12, *s.* 39, 43,) has given us an admirable abstract of the whole mercantile law on the subject of average, to which the jurist can seldom refer on any disputed point without meeting with entire satisfaction.

Note 30, *p.* 59. Many fanciful etymologies of the word

average are contained in the books. Some consider it derived from βαρος *onus*, αβαρος *sine onere*; others from *havre*, or from *haven*, because average is to be paid for by those whose goods arrive in the haven. *(Loccenius, De Jure Maritimo, l. 2, c. 8, n. 1; Kuricke, Jus Mar. Han. t. 8, fol. 168.)* It is not probable that the true etymology can ever be discovered. *Emérigon, Des Assurances*, i, 601.

NOTE 31, P. 63. Jettison is to be considered an involuntary act on the part of the master, and one to which he is compelled by superior force, and imminent peril. *Si connumera fra li fatali e forzosi. E una volonta violentata dell' accidente del pericolo. Targa, Ponderazioni, c.* 59, 60. And therefore jettison is always presumed to have been done without a scrupulous adherence to rules; because when death is staring the ship's company in the face, they have no time for formalities and deliberations. Targa says, that during sixty years that he was a magistrate in the consulate of the sea at Genoa, he had known only four or five cases of regular jettison, and they were suspected of fraud, because the forms had been too well observed for a time of imminent and extreme danger. *Emérigon, Des Assurances*, i, 605, 606.

NOTE 32, P. 63. It was formerly a question whether negro slaves might be thrown overboard to lighten the ship; but there is no doubt that such an act would now be considered homicide. The civil law accounted slaves *things*; but it never went so far as to comprehend them under the general term *merchandise. (Digest.* 50, 16, 207.) Therefore all authors agree that every thing on board, even the most precious articles, should be thrown overboard before slaves *(Ciceron, De Offic. l.* 3, *c.* 23; *Kuricke, Quæst. Illus. n.* xxx); and that if there is an unavoidable and imperious necessity to throw men into the sea for the preservation of the rest, they should be fixed on by lot. "*Si in certo periculo communis naufragii,*" says Kuricke, "*ubi spes subest potissimam navigantium partem servari posse, si qui ex iis in mare ultro prosiliant, vel etiam prævia sorte ejiciantur, ad hoc ultimum remedium pervenire licebit.*" Loccenius, however, *(De Jure Mar. l.* ii, *c.* 8, *n.* 7.) remarks that, "*si quis hominem in amnem aut mare præcipitaverit, ita ut pereat, est pœna capitis; si non pereat, est pœna pecuniaria.*" And Emérigon, *(Des Assurances*, i, 610,) lays it down, that whoever should throw others into the sea, whether freemen or slaves, whether fixed on by lot, or by choice of the stronger, would be guilty of homicide, because we have no right, in order to save our own lives, to kill those who have offered us no violence, *(Pufendorf, Droit de la Nature, par*

Barbeyrac, l. ii, *c.* 6, *s.* 3; *Id. Devoirs de l'Homme, l.* i, *c* 5, *s.* 25.) See *Emérigon, Des Assurances,* i, 206, 207, 610.

We will add, that the loss of slaves by death is only simple average. "*Servorum, qui in nave perierunt, non magis æstimatio facienda est, quam ægri in navi decesserint, aut aliqui sese in mare præcitaverint.*" *Digest. l.* 2, *s.* 5, *de leg. Rhod.*; *Kuricke, Jus Marit. Hanseat. p.* 787; *Emérigon, Des Assurances,* i, 633.

NOTE 33, P. 63. "*Prius autem ejiciendæ sunt merces majoris ponderis et minoris pretii. Et prius merces clam inscio navarcho impositæ aut suppressæ, quam aliæ. Indicanda etiam in tempore sunt bona cistis inclusa, antequam cistæ ejicientur; quod nisi fiat, solæ cistæ, quales extrinsecus apparent, non bona quæ in illis sunt, in æstimationem veniunt. Propriæ quoque res potius quam alienæ, in quas nihil juris habemus, jaciendæ sunt. Si vero jaciantur alienæ merces, quas magister navis ex benevolentia et amicitia, nullum pro iis pactus naullum, transvehendas recepit, de iis non tenetur.*" *Loccenius, De Jure Marit. l.* ii, *c.* 8, *n.* 4. See also *Kuricke, Jus Mar. Hanseat. t.* 8, *art.* 3, *f.* 777.

NOTE 34, P. 66. "If the ship was simply relieved by the jettison, and after some hours' interruption or diminution the storm recommenced with the same violence, or in some other way shipwreck followed, although several days after the jettison, there would be no ground for contribution." *Valin, Nouveau Commentaire,* ii, 207.

NOTE 35, P. 67. If the master take in goods contrary to his agreement, as when the ship is freighted to one individual, the charterer must nevertheless contribute for the loss of goods thus put on board without his knowledge, provided the master gave a bill of lading for them; but the charterer may claim an indemnity from the master on account of his fraud. *Emérigon, Des Assurances,* i, 640.

NOTE 36, P. 68. "This rule does not apply to boats and small vessels, which sail from port to port, where it is customary to lade goods on the deck as well as in the hold." *Valin, Commentaire,* ii, 203.

NOTE 37, P. 71. It is not usual, says Emérigon, to require of passengers to contribute for their clothing, jewels, money, coffers or baggage. But if the question were raised, there is no reason why the court should not make them contribute according to the opinion of the principal authors on maritime law, and principal ordinances. *Des Assurances,* i, 645.

NOTE 38, P. 75. The words in the original are *au marc la livre, de leur valeur.* The changes in the value of money

by means of repeated adulterations induced merchants to stipulate by the mark, and consider this a legal and received standard of calculation. Philip I. having quitted the livre or pound of twelve ounces to take the mark of eight, the words, *au marc la livre*, or *au marc pour livre*, came to be used in speaking of the loss which each creditor of an insolvent should bear according to the sum due him, or the part which each one should contribute to average-losses in proportion to the value of his merchandise. *Boucher, Consulat de la Mer, t.* i, *p.* 367, 369; *Encylopédie Méthodique, Commerce, sub voce Marc.*

NOTE 39, *p.* 78. "*Si quis jactum fecerit eo animo ut, si salvum fuerit, habeat, occupanti cedere nequit; quia jaciens non habuit animum derelinquendi. Itaque qui scit hoc et invenit, furti tenetur. Si vero hoc animo inveniens occupet, ut salvum faciat domino; aut si simpliciter aut derelinquendi animo jactatum (quod non facile præsumitur, nisi probetur) occupet, furtum non facit; quod enim nullius est cedit occupanti.*" *Loccenius, De Jur. Mar. l.* ii, *c.* 8, *n.* 5; *Digest. l.* 2, *s.* 8, *& l.* 8, *de leg. Rhod. de jactu; Emérigon, Des Assurances,* i, 611

NOTE 40, *p.* 80. But if it was promised for all, it would be gross average. *Si ergo navem ex piratis captam nauta redemerit promissa certa pecuniæ summa, pro qua ipse interdum captivus detineatur, liberandus erit communibus impensis, pro rata æstimationis cujusque mercium et ipsius navis.*" *Loccenius, De Jur. Mar. l.* ii, *c.* 8, *n.* 5.

NOTE 41, *p.* 82. If the freight is valued at 24,000, and the wages at 4,000, the freight should bear five-sixths and the wages one sixth; that is 24,000 : 4,000 :: 6 : 1 :: 7,000 : 1166⅔; which gives 5,833⅓ for the owner, and 1166⅔ for the seamen.

NOTE 42, *p.* 83. "When a mast is broken by a stroke of wind without the interference of man, it is simple average; but if, when the wind has broken a mast, it is necessary to cut it away and throw it into the sea with the sails and rigging, it is then gross average, for the value of the mast and its accessaries after it was broken." *Emérigon, Des Assurances,* i, 622.

NOTE 43, *p.* 87. The terms *loadsman* and *loadmanage* are now uncommon, but they were formerly used and are still found in older books on maritime affairs. In order to understand the definition of loadman given in the text, we must recollect that at this time every ship had her own pilot, and that the loadmen or locmen, as they are sometimes called, were precisely the same with our coast-pilots. *Peters' Adm.*

Decis. i, *ap. p.* 39; *Sea Laws, p.* 151; *Pothier, Contrats de Louage Maritimes, avis au lecteur, p.* 9.

Note 44, *p.* 88. "To prevent all discussion between the owners or masters of ships and merchant-freighters, with respect to the petty average spoken of in this and the preceding article; that is to say, to avoid the distinction between the cases in which this petty average should be sustained in common, and those in which it ought to fall on the ship; likewise to be freed from the embarrassment of being obliged to make a distribution of two thirds among the merchant-freighters; the usage has long been established to promise the owners a certain proportion beside the freight, to indemnify them on account of petty average, without distinguishing whether it is ordinary or extraordinary."—

"Hence the form of bills of lading every where is, after the stipulation to subjoin *beside average according to marine use and custom*, or some equivalent expressions." *Valin*, ii, 172, 173.

Note 45, *p.* 90. "The expense, which a ship incurs by sailing out of her way through fear of enemies and taking a longer course, is likewise general average. So the expense of recovering a ship, which the crew abandoned from the fear of being made prisoners or slaves, enters into a general average, even if the abandonment was made under mistake, provided there was any reasonable ground of misapprehension." *Emérigon*, i, 627.

Emérigon reports a case, on which he was consulted, of a ship which had the plague, and in consequence was refused admission in several places, obliged to stand out to sea, and at last purchased permission to land her goods in a foreign port to free them from infection by exposure in the open air. All these extraordinary expenses occasioned by the plague were considered general average. *Ibid.* i, 631, 632.

Note 46, *p.* 90. Valin shows that article 7 *Des Avaries*, is wholly irreconcileable with that *Du Fret, n.* 16, and also with that *De l'Engagement, n.* 5. "It is not possible," says he, "by any combination to reconcile these three articles so as to escape the reproach of contradiction, as well as of injustice at the bottom, both as regards the sailors with relation to the master, and the master with relation to the merchants."—

"This distinction, however, irregular as it is, does not affect sailors very much in the present state of things, nor ship-owners, because the hiring of sailors for the voyage is equally rare with affreightment by the month." *Nouveau Commentaire*, ii, 169, 170.

Note 47, *p.* 92. "*Si servum alienum quis, patrem familias arbitratus, hæredem scripserit, et, si hæres non esset, Mævium ei substituerit, isque servus jussu domini adierit hæreditatem, Mævius substitutus in partem admittitur.*" *Institut. l.* ii, *tit.* 15, *s.* 4.

Note 48, *p.* 93. With regard to the question who should bear the loss or damage caused the cargo of ships by their striking, Valin remarks, that it cannot be the master, because he is chargeable only when in fault, and that it has never been pretended that it ought to be the ship-owners. "This marine accident and misfortune can form nothing but a simple and particular average, solely at the charge of the thing injured. There is no exception to this but in the case when, to avoid the loss of both ships, the master of one, at the cry or requisition of the other's crew, cuts his cables and lets the ship drift at the mercy of the wind, or does any thing else which occasions the wreck of the ship. Here there would actually be ground for contribution to the loss, on the part of the ships and the cargoes, since the damage done the ship and cargo was caused by a measure taken for the common safety." *Valin*, ii, 180, 181.

"From the difficulty of knowing on whose side the fault lies, and even of judging whether the fault is of a kind to make him, who has committed it, to deserve to bear the whole loss, it generally happens that the injury suffered by both is accounted general average." *Ibid.* ii, 183.

Note 49, *p.* 106. See *Kuricke, Res. Quæs. Illus. n.* xxx; *Jus Marit. Hanse. t.* iii, *art.* 2, *p.* 699 *et seqq.*

Note 50, *p.* 112. "The condition of the master and crew is such, that the fate of their wages depends on the preservation of the ship and of the freight of her cargo. This freight, with the body and hull of the ship, her tackle-apparel and furniture, such is their pledge; they have no other assurance for the payment of wages. Nothing is better established: justice is not thereby wounded: and if it were otherwise, expediency and the interest of navigation necessarily exact, that this law should be executed in all its rigor. Personal interest influences men in general, and those of this class in particular. If they had no common interest in the preservation of the ship and goods, at the least peril with which they were menaced they would think only of saving their lives, without troubling themselves with the rest. It is therefore just and for the public good to attach their fortune to that of the ship." *Valin*, i, 701.

Note 51, *p.* 112. The expression on this point is very

strong in the Consulate of the Sea: "*car lors même qu'il n'y aurait qu'un clou qui peut les payer, ils devraient l'être.*" *Boucher, Consul. de la Mer, ch.* 139.

Note 52, *p.* 113. "In case of shipwreck the sailors are free to abandon every thing;—because there is not due, by the owner or employer of the ship personally, any wages or pay for expenses home; and of course there is nothing to say to them if they refuse to work in saving the wreck.—Perhaps it would be just to withhold from sailors, who refuse so to work, the wages fallen due, if any thing is preserved. But there must be a law to decide it expressly; for in fact their wages are due them out of property on which they have a special privilege, whether they do or do not labor for its preservation." *Valin*, i, *p.* 704. See, however, *Abbott on Shipping*, 436, 437; *Jus Mar. Hanse. t.* iv, *n.* 29, *p.* 661.

Note 53, *p.* 126. The *Code de Commerce*, has more nearly equalized the cases of a sailor hired by the voyage, and of one hired by the month, by requiring that, in case the voyage is broken up after its commencement, a sailor hired by the month shall be paid for the time he has served, and also, as indemnity, half the wages he would have gained if the voyage had not been relinquished. *Code de Commerce, n.* 252. See the *exposé des motifs* on the same article.

Note 54, *p.* 136. "If the freight has been paid the master, and he, instead of paying his crew, applies the money to the discharge of his own debts, nothing remains for the crew but an action against the master, without recourse to the shippers, or to the creditor who receives the freight." *Valin*, i, *p.* 751, 752.

Note 55, *p.* 136. The author of the foregoing work exhibits, at every step, a profound knowledge of his subject, and a knowledge which could not have been acquired without very extensive reading; but as he seldom cites any authority except the Pandects, the Marine Ordinance and Valin's Commentary; it may be well to take a view of the sea-laws and treatises, from which Pothier drew his opinions, and which constitute the foundation of our maritime jurisprudence.

The most ancient system of marine laws referred to by writers is that of Rhodes. The people of this island acquired commercial reputation at an early period, and the usages, which they followed in the regulation of maritime affairs, were so wise and just, that they were adopted by Rome as soon as she had extended her dominion beyond the boundaries of Italy. (*Gravina, De Ortu Jur. Civ p.* 756 *et seq; Emérigon, Assur. préf.; Cicero pro L. Manil. c.* 18.) It is doubtful whether

the Rhodians ever possessed a written code of these laws; and the pretended collection of them, which for a considerable time imposed on the literary world, *(Sea Laws, p. 76 et seqq.)* is now generally acknowledged to be spurious. *(North Am. Rev.* vii, 325, 326; *Peters' Adm. Decis.* ii, 479.*)* Indeed the Rhodian laws, as we learn from the famous rescript of Antonine, *(Digest. lib.* xiv, *tit.* 2, *l.* 9.*)* were a species of common or international law in the Mediterranean. *(Grotius, de Jure Belli ac Pacis, l.* ii, *c.* 3.*)* The spirit of these laws was gradually incorporated into the Roman law, until they came to form the substance of the maritime laws of Rome. *(North Am. Rev.* vii, 327; *Selden. Mare Clausum, lib.* i, *c.* 10, *s.* 5; *Sueton. Vita Tiberii Claudii; Schomberg's Obs. on Rhod. law; Park on Insurance, introduc. p.* 3, 7; *Pastoret, Dis. sur l'Influence des Loix Maritimes des Rhodiens; Bynkershoek, ad leg. Rhod, c.* 8; *Heineccius, His. Jur. Civ. Roman. Germ.; Azuni's Maritime Law, pt.* i, *c.* 4, *art.* 2; *Boucher, Consulat de la Mer, tit.* i, *liv.* 1, *c.* 2, 4.*)*

The next authority, therefore, on which the modern commercial law stands, is the Roman law as it exists in the Digest and Code of Justinian. The general principles of justice, which the civil law teaches, are the soul of all our international and maritime regulations at the present day; and although the titles in the civil law exclusively devoted to nautical concerns are few in number, yet their sound wisdom, compressed sense and apposite illustrations entitle them to the greatest consideration. Pothier, we have seen, adduces them whenever he has an opportunity. The most important of these titles in the Pandects are *L.* iv, *tit.* 9, *Nautæ, caupones, stabularii,* &c.; *L.* xiv, *tit.* 1, *De exercitoria actione; L.* xiv, *tit.* 2, *De lege Rhodia de jactu; L.* xxii, *tit.* 2, *De nautico fœnore; L.* xlvii, *tit.* 5, *Furti adversus nautas,* &c.; *L.* xlvii, *tit.* 9, *De incendio, ruina, naufragio,* &c. *(Azuni's Maritime Law,* i, 296 *et seqq.; Boucher, Consulat,* &c. *t.* i, *p.* 25 *et seqq.)* These titles, with the commentators on them, will be found to be of the very first utility to the commercial jurist. A translation of these titles into English is contained in *Hall's Law Journal.* (See also *Hall's Emérigon, ap.)*

During the middle ages, as commerce revived in the different states bordering on the sea, each one, for a time, followed its own peculiar usages,—for laws they had none at this period of ignorance and superstition. As these states increased in wealth and power, their maritime usages began to assume a a more distinct form, and were at last wrought into several written codes. These codes were not created in a moment,

nor were they acts of peculiar legislative wisdom; but the principles in them slowly grew up in the courts and commercial practices of several countries, and acquired confirmation from experience. *(North Am. Rev.* vii, 328, 329.*)*

The first modern code of sea-laws was compiled in the latter part of the eleventh century by the people of Amalphi, one of those numerous cities in Italy, which attained so much wealth and eminence in the pursuit of maritime commerce. *(Park, Sys. of Insurance, int. p.* 24; *Marshall, Treat. on Insurance, p.* 11; *Azuni's Maritime Law,* i, 376.*)*

Other states bordering on the Mediterranean followed the example of Amalphi; and in a short time one of them produced the curious and valuable collection of sea-laws called the Consulate of the Sea, which was probably compiled about the time of the crusades, *(Grotius, De Jure Belli, l.* 3, *c.* 1, *s.* 5; *Marquardus, De Jure Mercat. c.* 5, *n.* 59; *Vinnius, ad Digest.* xiv, 1, 2, *p.* 190; *Crusius, Opusc. Com. in leg. Rhod. de jactu;)* but by whose authority is altogether uncertain. The prevailing opinion is that, which traces its origin to Barcelona. *(Capmany, Codigo de las Costum. Mar. de Barcelona, disc. del edit.; Idem, Mem. sobre la Marina, Commercio y Artes de Barcelona, pt.* ii, *lib.* 2, *cap.* 2, *p.* 107 *et seqq.; Boucher, Consulat de la Mer, tom.* i, *liv.* 1. See however *Azuni's Maritime Law, pt.* 1, *ch.* 4, *art.* 8.*)* Wherever it was written, it soon attained great celebrity, and in the eleventh and twelfth centuries became the maritime law of the whole Mediterranean. *(Targa, Ponderazione, c.* 96; *Emérigon, Des Assurances, préf.; Casaregis, Disc.* 4, 6, 19, & 213. *North Amer. Rev.* vii, 329; *Lubeck, De Jure Avariæ, p.* 110; *Card. de Luca, de Credito, dis.* 107, *n.* 6.*)* The title of this remarkable collection was derived from the name of *consulate,* which then belonged to the maritime courts in the South of Europe. *(Ducange, Gloss. s. voc. Consul; Azuni's Maritime Law,* i, 331; *Boucher, Consulat, t.* i, *p.* 579 *et seqq.)* Some difference exists among learned men as to the value of the Consulate, and all agree that it is a confused, inexact and ill-arranged collection. *(Hubner, De la Saisie des Bâtimens neutres, dis. prél. p.* 11; *Bynkershoek, de Reb. Bellic. c.* 5, *Duponceau's tr. p.* 44.*)* Indeed it would be absurd to suppose that, at the time when it was compiled, any considerable judgment in selecting, skill in arranging or precision in expressing nautical usages, could have been possessed by men just emerging from total barbarism. The single merit of it is, that, among many trivial and many unjust rules, it contains some of obvious utility and importance, which experience suggested and sanctioned. *(North Am. Rev.* vii,

330; *Marshall on Insurance, p.* 15, 16; *Park on Insurance, int. p.* 25; *Valin, Nouveau Commentaire, préf.*; *Peters' Adm. Decis.* i, 106; *Azuni's Maritime Law, ubi supra.)* At present, however, it is interesting chiefly as an object of curiosity; because it has been superseded by more valuable codes; since the very wisdom of its provisions, by causing them to be sought after and adopted by legal writers and legislators, has proved the means of rendering the study of them unnecessary. The oldest known version of the Consulate is in the dialect of Catalonia, from which it was translated into Spanish, Italian, German and French. Some of the most eminent modern jurists have published editions of the Consulate, Casaregis in Italian, Westerveen in Italian and Dutch, and Capmany in Spanish. The best edition is the translation in French by Boucher, which is preceded by a volume of very learned, but crudely compiled, illustrations. *(Boucher, Consulat de la Mer, 2 tom. in* 8vo, *Paris,* 1808.)

At the same time that the customs of the sea inserted in the Consulate were in credit on the coast of the Mediterranean, Elinor, duchess of Guienne and queen of England, soon after her return from the Holy Land, drew up a compilation of judgments entitled the Roll or Judgment of Oleron, from the name of her favorite island, which her son Richard afterwards augmented and promulgated as the maritime law of Guienne and England. *(Cleirac, Us et Coutumes de la Mer, p.* 2; *Sea-Laws, p.* 116, 118; *Selden. de Dominio Maris, c.* 24; *Morisot, Histoire de la Marine, l.* 1, *c.* 18; *Fontanon, Ordon. Roy. tom.* iii, *p.* 865; *Blackstone's Com.* iv, 423; *Peters' Adm. Decis.* i, *ap. p.* 3; *Schomberg's Obs. on Rhod. Law, p.* 88; *Park on Insurance, int. p.* 26, 27; *Boucher, Consulat, t.* i, *c.* 18—20.) The Roll of Oleron was amended and published anew by John, Henry III and Edward III, and, as contained in the Black Book of the Admiralty, constitutes the basis of the admiralty law of England. *(Brown's Civ. and Adm. Law,* ii, 40.) As it was originally compiled for the dutchy of Guienne, then a great fief of the kingdom of France, and compiled by a vassal of the crown, it has always been claimed as their own by the writers of France. *(Emérigon, Des Assurances, préf.; Valin, Nouveau Commentaire, préf. p.* 377 *et seqq.)* The Judgment of Oleron was composed in Gascon French. It forms the first part of *Cleirac's Us et Coutumes de la Mer,* who has accompanied it with an excellent commentary. An English translation of it was published in the *Sea-Laws, (p.* 120 *et seqq.)* and republished in *Peters' Admiralty Decisions. (vol.* i, *ap. n.* 1.)

The next important collection of sea-laws is that of the Ordinances of Wisbuy. Wisbuy was formerly a rich and powerful city in the Swedish island of Gothland, and the most renowned market and fair in the North of Europe. *(Olaus, Magnus, Histor. lib.* x, *c.* 16; *Sea-Laws, p.* 124; *Peters' Adm. Decis.* i, *ap. p.* 69; *Emérigon, Des Assurances, préf.* 11; *Boucher, Consulat,* &c. *ubi supra.)* The history of its rise and of its fall is alike buried in obscurity, and no monument of its magnificence remains except its maritime regulations, which acquired the authority of a public law in all the countries beyond the Rhine. *(Grotius, Mare Liberum; Loccenius, de Jur. Marit. præf.)* The precise date at which these Ordinances were compiled is unknown; some writers even placing them before the Consulate of the Sea; *(Kuricke, Jus Mar. Hans. p.* 681; *Lubeck, De Avar. p.* 105.*)* but the most probable opinion is, that they appeared some time after the Judgment of Oleron. *(Boucher, Consulat, t.* i, *c.* 21, 25; *Valin, Commentaire, préf.; Cleirac, Us et Coutumes, p.* 3, & 161; *Azuni's Maritime Law,* i, 381—385; *Bouchaud, Théorie des Trait. de Commerce, c.* lx, *s.* 3; *Park, Syst. of Insurance, int. p.* 29.*)* Cleirac has published them in French in the *Us et Coutumes,* from which they were translated into English by the author of the *Sea-Laws,* where they may be found, *(p.* 175 *et seqq.)* as likewise in *Peters' Admiralty Decisions. (Vol.* i, *ap. p.* 69 *et seqq.)* They are likewise contained in *Verwer's Nederlandts See Rechten,* accompanied with annotations.

The precise date of the preceding codes is uncertain; but the subsequent compilations were made in periods better known to history. In 1434, *(Marshall, Treat. on Insurance, p.* 20.*)* the *prud' hommes,* that is to say, the municipal magistrates, of Barcelona, published divers regulations on marine insurance, quoted as the Regulations of Barcelona. They are usually printed together with the Consulate of the Sea. *(Emérigon, Des Assurances, préf. p.* 12.*)*

In 1551 Charles V published regulations concerning maritime commerce at Brussels, which were afterwards improved by his son Philip. They are denominated the Caroline Laws. *(Emérigon, Des Assurances, préf. p.* 12, 13.*)*

At the end of the sixteenth and beginning of the seventeenth centuries appeared the Laws of the Hanse-Towns. The nature of this confederation, the celebrity it acquired and the opulence of the towns composing it, are too well known to need repetition. In 1591 the deputies of the towns in the league assembled at Lubeck, and enacted a system of regulations for the government of their extensive commence. They

are printed in French in the *Us et Coutumes de la Mer, (p.* 186,) and in English in the *Sea-Laws, (p.* 195 *et seqq.)* and in *Peters' Admiralty Decisions. (Vol.* i, *ap. p.* 96 *et seqq.)* Afterwards in 1714 the consuls and deputies of the same free cities again assembled and published more copious and improved regulations than the first, which, now that the Hanse-Towns are comparatively speaking obscured by the might and wealth of other cities, which have grown up around them, will ever endure as testimonies of their early reputation, wisdom and splendor. *(Emérigon, Des Assurances, préf. p.* 13; *Sea-Laws, p.* 190—194; *Peters' Adm. Decis.* i, *ap. p.* 93—95; *Schomberg's Obs. Rhod. Laws, p.* 106; *Park's Syst. of Insurance, int. p.* 50, 51; *Azuni's Maritime Law,* i, 388 *et seqq.)* They are found in German and Latin, together with a learned commentary, in the *Jus Maritimum Hanseaticum.*

Beside these principal ancient marine regulations, Philip II, in 1593, enacted an Ordinance for the Insurances of the Exchange of Antwerp, and in 1598 the city of Amsterdam compiled a Custumary of Insurances, both of which are printed in the *Us et Coutumes de la Mer. (Emérigon, Des Assurances, préf. p.* 14; *Cleirac, les Us et Coutumes de la Mer, pt.* ii; *Verwer's Nederlandts See Rechten.)*

The last code of old maritime laws deserving attention is the Marine Ordinance of Louis XIV. Superseding all former laws on the subject, and incorporating into itself all that was most admirable in other ordinances, it merits a more detailed notice in this place from the constant reference to it in the preceding treatise by Pothier. Among the numerous projects of national aggrandisement entertained by Louis XIV, that for extending the commerce of his kingdom was early conceived and assiduously promoted by every means in his power. Colonial establishments were increased and regulated by him, navigation was encouraged, manufactories were established, the administration of justice and of the finances was reformed, and, as a certain method of attaining his object, a new code of marine rules and decisions was promulgated. *(Ordon. de la Marine, préamb.)* The design of it is attributed to the genius of Colbert. *(Sea-Laws, p.* 250.) This enterprising minister caused all the marine laws of his own and of other countries to be drawn together, carefully collated, explained by citations from all the writers on the subject and illustrated by the annotations of those learned men employed in the work. In the mean time the Marquis of Thibouville *(Henri Lambert)* received a commission authorizing and requiring of him to visit all the harbors and maritime towns of the kingdom, to inquire into the

laws, rules and usages there prevailing, and to examine the registries and collect the decisions of admiralty-courts. The materials obtained by this laborious process were next digested and abridged, then submitted to the perusal of merchants and advocates, and, when improved by the addition of new regulations adapted to the state of the country and the views of the king, promulgated in 1681 as the sole authentic marine laws of the kingdom of France. *(Valin, Nouveau Commentaire, préf.; Émérigon, Des Assurances, préf.; Peters' Adm. Decis.* ii, *ap.)*

Who was the able writer of this Ordinance it is impossible to determine with certainty; for, although several persons have been named as such, Valin confidently denies that there is any evidence to prove either of them entitled to the honor. Whosoever he may have been, every author of every nation allows, that he collected all that was most wise, most useful and most important in the maritime usages of Europe. The indisputable justice of the general principles of this Ordinance, the precision and comprehensiveness of its language, and the methodical nature of its arrangement, gave it the greatest authority, not merely in France, where it was so long the law of the land, but in every country which esteemed sound laws or aspired after superiority on the seas. *(Marshall on Insurance, p.* 18; *Abbott on Shipping, préf.; North Am. Rev.* vii, 340; *Park, Sys. of Insurance, int. p.* 33.*)*

Having reviewed these principal collections of sea-laws, we will now go back to examine the old treatises on maritime jurisprudence: for these being considered either as an evidence of the usage of merchants, or as the opinions of learned men, or as the decisions of maritime courts, are entitled to similar respect with codes formally promulgated.

One of the earliest writers on maritime law was Peckius, a civilian of Belgium, who flourished in the middle of the sixteenth century, and published in 1556 a tract *De Re Nautica.* This work, which was merely a commentary on certain titles of the Digest and Code, was enlarged and reprinted in 1647 by the celebrated civilian Arnoldus Vinnius. The improved edition was long in high repute; but "is more frequently quoted than read in our own times." *(North Am. Rev.* vii, 283; *Buderi Bibliotheca Juris Struviana, p.* 196; *Azuni's Maritime Law,* i, 279 *in not.; Valin, Commentaire, préf. p.* 16.*)*

Contemporary with Peckius was Quintyn Weytsen, a counsellor in Holland, who published a treatise on averages, of which a translation is printed among the works of Casaregis,

and the original in *Verwer's Nederlandts See Rechten. (North Am. Rev.* vii, 333; *Duponceau's Bynkershoek, int. p.* 29; *Valin, Commentaire, préf. p.* 16.)

Soon after the time of Peckius and Weytsen, Straccha, an eminent jurisconsult of Ancona, published, among other things, his tracts *De Mercatura, De Nautis, De Navibus, De Navigatione* and *De Assecurationibus*, in which he treats very copiously of these subjects, deriving his doctrines from general reasoning, the decisions of courts, the usages of merchants and especially the civil law, and exhibiting so much learning and judgment as even now to be considered a respectable authority. His writings are collected in a large work *(p.* 340—562*)* entitled, *De Mercatura Decisiones et Tractatus varii, Francofurt.* 1622, *fol. (North Am. Rev.* vii, 334; *Duponceau's Bynkershoek, int. p.* 28, 29; *Valin, Commentaire, préf. p.* 15.)

In the same collection *(p.* 796—824*)* with the works of Straccha, is one of Santerna, a Portuguese civilian, *(ego Petrus Santerna Lusitanus, p.* 796.*) De Assecurationibus et Sponsionibus Mercatorum.* It is a methodical treatise of some value on the subject of insurance. *(North Am. Rev.* vii, 334; *Duponceau's Bynkershoek, int. p.* 29; *Marshall on Insurance, p.* 22.)

The remainder of this collection consists of several minor treatises on mercantile law, and *(p.* 1—339*)* of a large number of decisions of the Rota of Genoa, generally quoted and known by the title of *Rota Genuæ*. These decisions are much in the style and manner of common law reports, containing a statement of the case, the points arising out of it, the arguments of the advocates and the judgment of the court, all expressed in neat and concise language, and full of sound learning and equitable opinions. They must have been pronounced in the latter part of the sixteenth or beginning of the seventeenth century. *(Ingersoll's Roccus, p.* 53 *not.; Duponceau's Bynkershoek, int. p.* 28; *Azuni's Maritime Law*, i, 418.)

To the same period is to be referred the valuable treatise, entitled the Standard of the Sea. *(Guidon utile et nécessaire pour ceux qui font Marchandise et qui mettent à la Mer.)* It was composed for the benefit of merchants trading in the city of Rouen; and its author, says Cleirac, in treating of the contract of insurance, has so skilfully interwoven with his main subject whatever relates to maritime contracts in general, that he has omitted nothing except to subjoin his name, and thus complete the obligation he has conferred on his country. The Standard of the Sea is praised by writers for the wisdom of the numerous principles and decisions it comprises. It is

printed in the *Us et Coutumes de la Mer. (Emérigon, Des Assurances, préf.; Cleirac, Us et Coutumes, pt. 2; North Am. Rev.* vii. 335; *Marshall, Treat. on Insurance, p. 22.)*

The seventeenth century produced many valuable writers on mercantile law, among the first and most celebrated of which is Juan de Hevia, a native of Oviedo in Spain, who published an institute of the laws of his country under the name of *Curia Philippica.* The third book of this work is on commercial contracts; and from its great excellence has been made the foundation of many later works on the subject of maritime jurisprudence. It is remarkable for the clearness, brevity and precision of its style and the sound wisdom of its principles. *(Duponceau's Bynkershoek, int. p. 24; Ingersoll's Roccus, p. 13 not.; North Am. Rev.* vii, 337.*)*

Next in credit to Juan de Hevia, and indebted to him for much of his merit, is Roccus, who was an eminent civilian and judge in the city of Naples. His works, first printed in 1655, consist of *Responsa* on various subjects and of two tracts on maritime law, the one entitled *Notabilia de Navibus et Naulo,* the other *Notabilia de Assecurationibus.* None of the older writers are more frequently quoted or more deservedly praised than Roccus. His *Notabilia* are a series of brief texts, selected and abridged from preceding authors, and distinguished for their conciseness, accuracy, discrimination and practical utility. *(North Am. Rev.* vii, 336, 337; *Ingersoll's Roccus, pref.; Buderi Bib. Jur. Struv. p.* 196.*)* A neat and finished translation of the *Notabilia* has been published by Joseph R. Ingersoll, Esq. of Philadelphia. *(A Manual of Maritime Law, Philadelphia,* 1809, *pp.* 156, 8*vo.)*

In the middle of the seventeenth century likewise flourished Etienne Cleirac, the learned editor of the works first published at Rouen, in 1647, under the title *Us et Coutumes de la Mer.* The principal part of these works have already been separately noticed; but this book is not merely a compilation; it is enriched with copious and learned notes, which entitle Cleirac to be placed in the very first rank of maritime jurists; and the highest praise, which could possibly be conferred on an author, belongs to him, namely, that his writings are the source from which lord Mansfield obtained many of the best principles of commercial law now prevailing in England. *(North Am. Rev.* vii, 336; *Marshall on Insurance, p.* 22; *Peters' Adm. Decis.* i, *ap. p.* 4.*)*

Contemporary with Cleirac were Stypmannus, Kuricke and Loccenius, whose works the great civilian Heineccius collected in a single volume and printed, with a learned preface, at

Halle, in 1739, under the title *Scriptorum de Jure Nautico et Maritimo Fasciculus. (Duponceau's Bynkershoek, int. p. 27; Buderi Bib. Jur. Struv. p.* 196, 197; *North Am. Rev.* vii, 336.)

Loccenius, a professor of law at Upsal, in Sweden, published at Stockholm, in 1652, his treatise *de Jure Maritimo et Navali*, consisting of a general and concise abridgment of maritime law, which, though sometimes referred to, is mostly superseded by more recent publications. *(Azuni's Maritime Law*, i, 407, *note.)*

Stypmannus, whose work, entitled *Jus Maritimum*, was first printed at Gripswald, in 1652, is more full than Loccenius, discussing every question with great minuteness and oftentimes indeed with tedious prolixity.

Kuricke has left us three tracts, first published in 1667, at Hamburg, namely, *Diatriba de Assecurationibus*, which is very brief and cursory, *Jus Maritimum Hanseaticum*, consisting of the Laws of the Hanse-towns with a collateral version in Latin, followed by a copious, learned and valuable commentary, and *Resolutio Quæstionum illustrium ad Jus maritimum pertinentium*, which may be considered as a sort of supplement to the preceding work. The writings of Kuricke contain much useful information, deep learning and ingenious reasoning; but his learning too frequently degenerates into pedantry and his ingenuity to trifling subtleties, idle distinctions and scholastic speculations.

Another writer on maritime law, who lived about this time, and whose writings, although commended for their superior accuracy by Struvius, are now little studied, was Marquardus, who published at Frankfort, in 1612, a large volume on commercial law in general, entitled *Tractatus politico-juridicus de Jure Mercatorum. (Duponceau's Bynkershoek, int. p.* 27; *Buderi Bib. Jur. Struv. p.* 198.)

Another author of the same kind was Scaccia, who published, in 1662, a work on the law-merchant, including maritime law, under the name of *Tractatus de Commerciis et Cambio. (Buderi Bib. Jur. Struv. p.* 198.)

We pass directly from these comparatively obscure names to the independent, original and acute Bynkershoek. The commendation of him as a publicist and civilian belongs to other pens; it is enough to note on this place, that among his numerous works on civil and international law, there is a dissertation, in his *Opera Minora*, on the Rhodian Law first printed in 1703, at the Hague, and several chapters on commercial and maritime law in his posthumous work entitled *Quæstiones*

Juris Privati. In these tracts, as every where else, he uniformly exhibits, to use the language of Heineccius, *judicium acre, ingenium solers, juris scientiam inusitatam ac denique incredibilem. (Duponceau's Bynkershoek on the Law of War; North Am. Rev.* vii, 337, 338; *Bynkershoek, Obser. Jur. Rom. præf. ed. Heineccii.)*

The next writer on maritime law to be noticed is Casaregis, who was born at Genoa in 1670, and died in 1737, after having ably discharged, for twenty years, the duties of a judge in the supreme tribunal of Tuscany. His works, which are quite voluminous, consist, so far as they are interesting in the present connexion, of two hundred and twenty six dissertations on various subjects of the law-merchant, entitled *Discursus de Commercio*, a translation of Weytsen, as above mentioned, called *Tractatus de Avariis*, both in Latin, an edition of the Consulate of the Sea accompanied with an original exposition, and a treatise on bills of exchange by the name of *Il Cambista Istruito*, the two last in Italian. The character of Casaregis cannot be given more perfectly than in the words of the most learned and valuable article, to which this note has repeatedly been indebted, in the North American Review. "His commercial discourses," it is there said, "are by far the most valuable of all his works to a modern lawyer. They embrace the whole circle of commercial law, including the law of prize, and are written in a plain, clear style, abounding in just and practical remarks and sound learning. All that is most useful in the works of former jurists is collected and commented on with acuteness and accuracy, and for the most part the topics are examined, until the whole subject matter is exhausted. Rarely have we looked into his works upon any contested question, without rising instructed and enlightened by the perusal. Higher praise cannot be bestowed upon him than the fact affords, that he is quoted by all subsequent writers on commmercial law as a leading and safe authority, and Valin does not scruple to affirm, that he is beyond all contradiction the best of all the maritime authors. In recommending him therefore, to the diligent study of our own lawyers, we are confident that we do them a substantial service, which will be estimated the more, as familiarity with his works makes his merits more extensively known." *(North Am. Rev.* vii, 338, 339.)

Another highly useful writer, of the same age and country with Casaregis, was Targa, who, as he himself incidentally informs us, *(cap.* 58,) was for sixty years a magistrate in the consular court of Genoa, and published a learned, correct and useful treatise on maritime law entitled *Ponderazioni sopra la*

Contrattazione Maritima. (*North Am. Rev.* vii, 339; *Azuni's Maritime Law*, i, 419.)

We come now, in the last place, to speak of a writer to whom Pothier is under greater obligations than to all the rest together, namely, Valin, author of the *Nouveau Commentaire sur l'Ordonnance de la Marine de* 1681. This Ordinance had been commented upon, and collated with the civil law and the ancient and modern ordinances, so early as the year 1714, by Marville, (*Ordonnance de la Marine*, &c. *commentée et conférée sur les anciennes Ordonnances, le Droit Romain et les nouveaux Réglemens.*) who, although a writer of considerable industry and merit, was not capable of doing complete justice to a subject so comprehensive. This great task was reserved for Valin, an eminent advocate of Rochelle, who published, in 1760, an edition of the Ordinance with a perpetual commentary on every article, in which an immense fund of erudition, collected from the civilians, the ancient sea-laws, writers on maritime law, decisions of courts, opinions of merchants and later ordinances, was applied to the elucidation of the text with a precision and success unequalled by any similar work in jurisprudence. Nothing is left uncertain, which industry could establish, nothing unaccounted for, which ingenuity could explain, nothing obscure, which learning could illustrate. The publication of this work gave a definiteness and character to maritime law, which it had not before possessed, removed a thousand difficulties, which obstructed the study of the science, and led the way for the composition of the finished treatises of Pothier and Emérigon. Indeed much of the merit of the work, as Valin candidly declares, is due to Emérigon, who furnished the author with a large manuscript collection of notes and judicial decisions, the fruit of many years elaborate inquiry and observation. From this source are derived the numerous decisions, which Valin reports, of the court of admiralty of Marseilles; all which were collected by Emérigon, during a long period that he was an advocate in the parliament of Aix. (*Dictionnaire Hist. de Chaudon et Delandine.*) The treatises of Pothier on the subject of insurance, maritime loans, and maritime contracts of letting to hire, exhibit, on every page, his respect for Valin and his obligations to the *Commentaire*. And all maritime jurists allow that the work of Valin is worthy of the Ordinance he expounded, and that, as the latter is one of the most perfect acts of legislation, so the former is one of the most perfect commentaries, ever given to the world. (See the authors cited *ante*, *p.* 158.)

Of the numerous and distinguished writers on other parts of

commercial law beside maritime contracts this is not the place to speak; nor does the subsequent literary history of maritime law, and especially the contemporary growth of it in England, come within the scope of this note; which was only designed to indicate the sources of maritime law, which lay open to the researches of Pothier and from which he plainly derived the most valuable information.

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